

83-953

No. _____

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In The
Supreme Court of the United States
October Term, 1983

○
RICHARD ROCK,

Petitioner,

vs.

ESTHER ANTONIO,

Respondent.

○
**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO**

○
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QUESTIONS PRESENTED FOR REVIEW

1. Do the State Courts of New Mexico have jurisdiction for a paternity case filed by a full-blooded Navajo mother who is registered as a member of the Navajo tribe and who seeks to establish paternity for her child whom she enrolled as a member of the tribe, where Tribal Law requires the action to be in Navajo Tribal Court?

2. Does forced blood removal for HLA testing violate federal, constitutional and human rights?

3. Does a threat of default in this paternity case violate constitutional and human freedom and is it governmental oppression in violation of the 14th Amendment of the United States Constitution?

4. Is a use of State Court contempt power, although disguised as sanctions, violate individual freedom and is there a taking of "life", "liberty" and "property" in violation of the 14th Amendment?

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JURISDICTION

The Order of the New Mexico Supreme Court dismissing the Appeal in part is not reported. It appears in App. 36.

The Order of the New Mexico District Court which was appealed is not reported. It appears in App. 2.

The Order of the New Mexico Supreme Court on the Appeal was filed August 25, 1983, App. 36.

The Order denying a Rehearing by the Supreme Court of New Mexico was filed September 7, 1983, App. 49.

The Mandate of the Supreme Court of New Mexico was filed September 22, 1983, App. 50.

An Order denying a Stay was filed September 14, 1983, App. 51.

The case is now in the District Court of Bernalillo County awaiting a trial scheduled for January, 1984.

This Court has jurisdiction under 28 USC § 1257 as this is a Petition for Certiorari from an Order and Mandate of the Supreme Court of New Mexico dismissing an Appeal which was a Constitutional appeal to the Supreme Court of New Mexico, Art. VI, § 2, NMSA (1978). Assertions of Federal issues appear throughout appendix material and Statement of the Case.

○

**CONSTITUTIONAL PROVISIONS, TREATIES,
AND STATUTES INVOLVED**

1. Treaty of 1868 between United States of America and Navajo Nation (App. 65)
2. Enabling Act of New Mexico (App. 78)
3. 25 CFR § 11.30 (App. 26, 27)
4. Navajo Tribal Code T. 7 § 133 1969 ed. (App. 27)
5. Resolution CJ 4-1-5 Navajo Tribal Council (App. 27)

6. Art. I, § 8 of the U. S. Constitution which states "The Congress shall have power to regulate commerce with Indian tribes."

7. Indian Child Welfare Act 25 USC §§ 1901 et seq. (partly set out in App. 83-85)

8. New Mexico Statute 40-5-1 1978 Cong. (partly set out in App. 54-58)

9. Art. VI, § 2 of New Mexico Constitution which states "an aggrieved party shall have an absolute right to one appeal."

10. 14th Amendment of Constitution of United States states as follows:

"1. Constitution of the United States, Amendment XIV:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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STATEMENT OF THE CASE

This is a paternity case brought by a full-blooded Navajo mother against a Caucasian male who is a long time resident of Albuquerque, New Mexico which is over 100 miles from the Navajo Reservation. The Amended Complaint filed August 30, 1979 is pursuant to a New Mexico Statute, App. 52.

The child, Rachael Antonio, is enrolled as a Navajo child with a Navajo census number, App. 64. The birth

certificate identifies the mother as a Navajo and no father is identified. The child was born May 11, 1975 in an Albuquerque hospital and was full term according to the sworn deposition of the obstetrician. The Statute of Limitations had expired prior to the filing of the original complaint on April 4, 1979 by almost two years but there is a tolling provision if the child has been supported. See Amended Complaint, App. 52. The Defendant denies all allegations and all matters are issuable. This illegitimacy and support statute *supra* requires a jury trial, App. 56, which differs from all other civil actions where it must be claimed. The question of Federal issues was presented initially in the Defendants affirmative defenses, App. 54, which alleged lack of jurisdiction over the "parties" herein and lack of jurisdiction over the subject matter, App. 54. The trial Court denied a Motion to that effect early on. Lack of jurisdiction and other matters were raised by an original action in Prohibition in the New Mexico Supreme Court and denied without comment. Lack of jurisdiction and other matters were raised in this Court on an *Appeal* from New Mexico's denial of a Petition for a Writ. The Jurisdictional Statement filed to this Court is itself a claim of Federal issues and claims Federal issues from the Treaty of 1868 between the United States and the Navajo Nation. From the initial filing of an answer and through every step of the proceedings defendants have asserted Federal jurisdiction over Navajo Indians and have constantly urged that the Federal Court are the only enforcement body for Indian self-government. Specifically at every step Petitioner's claim that the Navajo Tribal Code accepted as Tribal Law the regulation of the Department of the Interior in 25 CFR § 11.30 which states "The Court of

offenses shall have jurisdiction of all suits brought
 Indian Off. to determine the paternity of a child and to obtain a
 to determine for the support of the child."
 judgment

o HLA testing and a Federal issue, Transcript
 As to 5, 149, 153, 156, filed in the New Mexico Appeal
 Pages 145 that Constitutional objections were made to a
 showed the HLA testing at the time of the oral argument in
 forced HI Court. There were frequent claims for Con-
 the trial l protection at every stage. The transcript of
 stitutional gs in the trial court, TR 4, in referring to the
 proceedings anctions to force the defendant to submit his
 use of sa HLA testing states "we feel like that is not only
 body to H on of Constitutional rights but a violation of
 a violation an rights for somebody who is not even charged
 basic human time." Our Brief on Appeal shows a constant
 with a cr against the violation of Constitutional and human
 protest ag op. 10-27. So does our Petition for Rehearing to
 rights, Ap me Court, App. 38-48. The New Mexico trial
 the Supreme posed sanctions upon the alleged father in the
 court imp default judgment unless he bowed down. See the
 form of a which was appealed, App. 2, "If the defendant fails
 Order whi for HLA and Red Blood Cell typing as above
 to appear then the Court will enter default on the Paternity
 ordered, t issue." There has been no appeal in this case except the
 one from which we are filing this Petition in the Court for
 a Writ to the New Mexico Supreme Court.

A State court judgment ordering forced HLA creates
 a Federal issue by its very utterance. Deprivation of
 full physical "life", "liberty" in its fullest meaning and
 "property" appear on the face of the Order appealed,
 App. 2.

Petitioner has included in App. 87 his Request for Transcript of Proceedings which included his appeal "points" which were 10 in number and included many material points about HLA testing and "the court was without jurisdiction to enter such Orders", App. 88. Included as an Appeal Point was "9. It was error to deny Defendant's Motion to file a Counter-Claim", App. 88. The Tr. p. RP 37 and is copied in the Appendix.

The Counter-claim alleged extortion by the Plaintiff as a means of obtaining money and a letter to the Defendant's wife was attached stating that the Defendant would be picketed at his office, hospital, and home unless he went to the Plaintiff's attorney. The letter is violent and came from the Navajo Reservation at Crownpoint. It and the Counter-claim are reproduced in App. 91.

REASONS WHY THE APPEAL SHOULD BE GRANTED

I.

State Jurisdiction Over Paternity Of A Navajo Indian Child Interfers With Indian Sovereignty.

The basis for the truth of the above lies in the Navajo Tribal Code which "The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child.", supra. The same identical provision is found in a regulation of the Department of the Interior, 25 CFR § 11.30, supra.

The foregoing expressed laws of the Navajo Tribe and the U. S. Government have been and are still appli-

cable. What are the originating basis for these two Code expressions? First of all, the Treaty of 1868 between the United States Government and the Navajo Nation, App. 65. A treaty between *two* parties must be of its very nature one between two independent political entities capable of exercising independent political functioning. The Preamble of the Treaty of 1868 makes such a recognition, App. 65. One hundred and thirteen years since 1868 have not resulted in an abrogation of the Treaty of 1868. Indian self government, therefore, is a present reality for Navajo Indians. Self government is meaningless unless the United States Government enforces it when it is threatened outside the Reservation. How can Mandated enforcement be discretionary on the part of any branch of the U. S. Government without destroying the treaty and its recognition of Indian sovereignty?

In the U. S. Courts the case of *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 56 L. Ed. 106, 98 S. Ct. 1670, an attempted "exception" by an act of U. S. Congress was presented. This case involved New Mexico Pueblo Indian sovereignty. This celebrated case shows that the U. S. Congress is limited by the meaning of the Treaty of 1868. Although the *Santa Clara* case, *supra*, 1675 in 98 S. Ct., decided that the Pueblo had immunity from suit, it necessarily found that the Federal Courts have the forum to enforce Indian sovereignty. It likewise held of necessity that the *rights* of Julia Martinez, a full-blooded Santa Clara Pueblo Indian under an act of Congress enacted for her benefit, were secondary to Pueblo rights to govern her. Is it a necessary conclusion that Julia Martinez could not go outside the Pueblo Government to contradict the Pueblo right to govern her?

The Navajo Mother in our case is a full-blooded Navajo now residing on her Indian ancestral lands of the Navajo Tribe, App. 61. She differs not all from Julia Martinez, the Pueblo woman, *supra*. Both of these Indian women were acting in behalf of their Indian children although the Navajo mother in our case did not bring her Navajo child into the State Courts of New Mexico, App. 52. Although the two cases vary greatly, both mothers are acting against their Indian governments on specific legislature enactments. The Navajo woman violates the Navajo Code by evading its mandated Navajo forum for paternity and support. Both women are in violation of *their own* Indian government. *Martinez v. Santa Clara Pueblo* clearly decides the superiority of Indian Governments over individual Indian Rights. There are distinctions between the two Indian women cases as to legal effects viz that the Pueblo Mother wanted the Federal Courts to act against her Pueblo government directly whereas the Navajo woman refuses to use her own Navajo Court when she is mandated to do so. However, could not the Navajo Courts discipline her for not obeying its laws? Does the fact that the Navajo government has not provided a sanction up till now make the case different in its fundamental jurisdictional aspects?

If the Federal Courts in the *Santa Clara* case, *supra*, could not interfere with Indian self-government, is there any reason why the State Judiciary of New Mexico should provide a forum for the avoidance of the Navajo Courts? The New Mexico Enabling Act says "no", App. 78. The New Mexico case of *Natewa v. Natewa*, 84 N. M. 69, 499 P. 2d 69, says "no".

Is there anything lacking in Federal Judicial authority which presents the enforcement of Treaty guar-

anteed Indian self-government against New Mexico State Judicial channels? Not unless the Federal Government has surrendered its supremacy over Indian affairs and thereby made the Treaty of 1868 a nullity. If the U. S. Congress could not impose Indian rights upon the Federal Courts, it is judicially impossible that a State government recognize a Navajo woman's evasion of Navajo Jurisdiction through the State Courts. *Santa Clara*, supra.

The New Mexico Courts have been presented with a paternity action involving an Isleta Pueblo Indian. *State of New Mexico ex rel. Department of Human Services v. Jimmy Jojola, a Pueblo Indian*, 99 N. M. 500, 660 P. 2d 590, which case went to the U. S. Supreme Court being Cause 82-2049 and where Certioari was denied on October 3, 1983, found at 104 S. Ct. 49, App. 78.

The New Mexico Supreme Court allowed jurisdiction for the paternity action, supra. The New Mexico Supreme Court reversed a Dismissal by the State Trial Court. A decision on the facts had not yet been reached, and was never reached because the Attorney General of the State of New Mexico withdrew the Paternity action by Department of Human Services on the expressed grounds that the State Court lacked jurisdiction over the Pueblo Indian child and the alleged Pueblo Indian father, App. 76, 77, and the Attorney General refused to go ahead because it violated Pueblo self-government. While on Appeal a Pueblo Indian Tribe from the State of Washington filed an Amicus Curiae Brief, App. 69-75, protesting against usurpation of tribal jurisdiction by the New Mexico State Courts. They convinced the Attorney General, App. 76. An examination of the New Mexico Supreme Court decision supra furnishes no authority for State jurisdiction

in our case since it was based on the right of the New Mexico agency to recover welfare payments made in behalf of the Indian child under "New Mexico's Public Assistance Act". Justice Riordan cited many strong cases denying State Court jurisdiction over Indians including *Williams v. Lee*, 358 U. S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 261, and reaffirms them but finds that an "exception" exists because the State is the only Plaintiff and is trying to get its "public assistance" funds back from the father. Is that case any help to the Navajo mother as sole Plaintiff herein where there is nothing involved of "public assistance" in any way? New Mexico, therefore, has a conflict between its Supreme Court and the Attorney General as to a Paternity action by the State.

The "*Jojoba*" Opinion, p. 593, justifies State jurisdiction on two grounds: (a) the mother applied for public assistance and "assigned" her right to support to DHS; therefore "DHS has the right to collect this support obligation from the father". Justice Riordan also held that the "cause of action arose outside the reservation when and where the mother filed and obtained public assistance." That base for jurisdiction is nowhere duplicated in the instant case. The Attorney General has answered the case by saying that he would file to *recover* the public assistance funds *after* the Public Court had determined paternity. He refused to interfere with the tribal right to determine the paternity of a Pueblo Indian child.

Is there anything that has occurred in our case which at this stage bars this Court from deciding whether the Navajo Tribal Code requiring paternity to be decided in the Navajo Courts for Rachel Antonio should be

disregarded? This question of jurisdiction was presented to this Court in this very case in *State of New Mexico ex rel. Richard Rock v. Honorable Harry Stowers*, which was No. 81-1034, App. 82. That Appeal was denied.

That was an Appeal from an original proceeding in Prohibition in the New Mexico Supreme Court where relief was denied and where lack of jurisdiction was not the only matter presented, App. 82, 83. This case *now* comes to this Court through the Appellate procedures of New Mexico. A distinction exists between Prohibition and Appeal. The latter is a Constitutional Right, Art. VI § 2, and a decision becomes New Mexico law. Prohibition not published is not law. The denial of Prohibition 1981 had no status. Indian Mothers have free access to New Mexico Courts *only* since this Appeal was dismissed by the New Mexico Supreme Court on September 7, 1983, App. 49, from which Denial of Rehearing this Petition comes here. By New Mexico law, jurisdiction can be raised at any time and can be raised on Appeal for the first time and can never be waived and can be raised on Appeal even though raised before as in the Prohibition proceeding of 1981. See Appellees Brief in Chief and Petition for Rehearing, App. 29. The appeal to the New Mexico Supreme Court is the only appeal in this case and is the springboard for coming to this Court under 28 USC § 1257.

There are no facts raising *equities* in favor of the Navajo Mother. If there were, it would not confer jurisdiction, however, in this case the Navajo woman left the reservation, came to a state town, called the Defendant requesting his presence in her motel for sexual relations. This is her own testimony filed in Court. De-

fendant denies paternity and denies relations with her at the time when she would have become pregnant, and denies support. Under oath testimony from plaintiff's doctor said that she did not know when she had the sexual relations causing the conception.

The basic document is the treaty with the Navajos in 1868. There were promises and considerations furnished by the Navajos in return for the obligations assumed by the United States. The Indian Child Welfare Act, 25 U.S.C. §§ 1901, et seq., App. 83-85, expresses a national interest in Indian children and finds expression in this language: "There is no resource that is more vital to the existence and integrity to Indian tribes than their children. Rachel Antonio is a Indian child and although a paternity action as such is not the direct subject matter of the Indian Child Welfare Act, nevertheless she is of the class towards whom the congressional "Declaration of Policy" § 1902, App. 83, is directed.

In recent years decisions from this court have recognized the necessity of restraint upon state authorities in commercial matters, *Williams v. Lee*, 358 U.S. 217, 3 L.Ed. 2d 261, 79 S.Ct. 269. The State of New Mexico by its Enabling Act (36 Statutes at Large 557, Chapter 310), rejected Indian jurisdiction, App. 78.

Within the field of domestic relations, the New Mexico Supreme Court in 1972 spoke in *Natewa v. Natewa*, 84 N.M. 69, 499 P.2d 691 and cited the Department of Interior's resolution that the Court of Indian Offenses shall have jurisdiction of all suits brought to determine the Paternity of the child and to determine the support of a child. The Department of Interior Resolution 25 C.F.R. 11.30, quoted with approval therein reads: "The

Court of Indian Offense shall have jurisdiction of *all* suits brought to determine paternity of a child and to obtain a judgment for the support of the child." *Italic supplied.*

The Department of Interior Resolution, § 11.30, *supra*, continues with equality strong language about the exclusiveness of Indian jurisdiction on paternity and support matters, and at the same time prohibiting any thought of concurrent jurisdiction, where it says, "A judgment of the court establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court of Indian Offenses."

The instant case by being allowed jurisdiction in the State Court of New Mexico violates the "two barriers" laid down in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 65 L. Ed. 2d 665, 100 S. Ct. 2578 (1980). There is a preemption by Federal Law as expressed in the Department of Interior's regulation, 25 CFR § 11.30, *and* also an infringement "on the rights of reservation Indians to make their own laws and to be ruled by them." If commercial transactions and tax questions as in *Williams v. Lee*, *supra*, and *White Mountain Apache Tribe v. Bracker*, *supra*, can be the subject of federal government protection for the Indians against the taxing authority of the State or the right to sue by a State citizen, then the right of the Indian tribe and tribal government to determine such domestic affairs as Paternity for its members, would call for even greater protection and restraint on the State courts from usurpation by the State judiciary. The Indian Child Welfare Act, *supra*, could have an application to a Paternity action under the New

Mexico Statute Section, Appendix 44a. Esther Antonio's Complaint in Bernalillo County, New Mexico is filed under the New Mexico Statute on Paternity and permits extensive control over the child even beyond the Paternity determination, App. 56. § 40-5-1, App. 57, says: Jurisdiction if acquired on the basis of determining Paternity, does, per se, establish jurisdiction for custody determination. Therefore, submitting to a trial in the New Mexico court under its Paternity statute, is to place the Indian child in the direct court jurisdiction of this particular state court for the entire period of its minority. It also places the Indian mother under the direct control of the court and she could be deprived of custody by the provisions of the New Mexico statutes. App. 46a. Obviously, this is a usurpation of the tribal right to govern its own members, and could affect termination of membership in the tribe. *Santa Clara Pueblo v. Martinez*, dealt with significant problems of tribe membership and pointed out that non-tribal courts and agencies should not be permitted to affect membership in the tribe or pueblo even though, judged by American standards of equality and due process, the actions of the tribe or pueblo seem unconstitutional. *Santa Clara v. Martinez*, *supra*.

In the case of *Fisher v. District Court*, Sixteenth Judicial District, *In the Matter of the Adoption of Ivan Firecrow*, 424 U. S. 382, 47 L. Ed. 2d 106, 96 S. Ct. 953, closely resembles the instant case. An Indian child was the direct object of the legal proceeding. It was contended that the congressional policy of furthering Indian self government constituted an impermissible racial discrimination and that to deny Jurisdiction in the Mon-

tana court would deny equal protection to Indian Plaintiffs. A similar contention could be raised herein. This court in *Fisher*, supra, pointed out that state court jurisdiction had been denied even in litigation between Indians and non-Indians in *Williams v. Lee*, supra, and since the litigation in the Montana Court involved only Indians, at least the same standard must be met before the State Court could exercise jurisdiction. In language that could be applied directly to our case, the *per curiam* opinion states:

"The exclusive jurisdiction of the Tribal Court does not derive from the race of the Plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self government. *Morton v. Mancari*, 417 U.S. 535, 551-555, 94 S. Ct. 2474, 2483-2485, 41 L. Ed. 2d — (1974)."

The Indian Child Welfare Act envisions the many and varied problems of inheritance resulting from family changes affecting Indian children. Many unsatisfactory results would follow by allowing the State Courts to proceed in a Paternity action by a Navajo mother for her Navajo child. In *U.S. v. Quiser*, 241 U.S. 602, 36 S. Ct. 699, 700 (1916), Justice Van Deventer declared the Opinion of the court in these words:

"At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses against another to be dealt with, according to their Tribal customs and laws."

It is the child, Rachel Antonio, whose status is going to be affected and potentially could be affected again and again in the New Mexico Paternity proceeding, including her status with her tribe. The decisions of this Court clearly state that her tribal court should decide her status and all the matters that flow from that like inheritance, etc., *Santa Clara Pueblo v. Martinez*, supra.

The fact that Esther Antonio, the Indian mother, herself invoked the State Court does not change the fact that the "child" Rachel is the real person involved. Jurisdiction cannot be conferred by consent, *Nelson v. Dubois*, 232 N.D. 54 (1975). Reference to *Fisher v. District Ct. of Montana*, supra, shows that case captioned as "In re: Ivan Firecrow, et al., in the Montana Court," Ivan Firecrow being the Indian child involved. The caption indicates the true nature of the proceedings herein even though this case was styled Esther Antonio vs. the alleged father. The "Indian child", Rachel, has been forced into State Court.

II.

Forced HLA Testing Is Unconstitutional.

New Mexico Rules of Procedure and Federal Rules Are Identical on the Pertinent Provisions.

HLA is not a blood test determinative of paternity. It is a test of probabilities based on statistics. We contend that the 14th Amendment protects an alleged father from being forced to take the test.

Rule 35 provides expressly for physical and mental examination including blood group testing. Rule 37—Sanctions, is the same.

Conclusion: State and Federal statutory authority for physical examination including blood grouping—this would include the right to order a blood sample—is a false application to this case. HLA testing is different from blood grouping. Blood groups are recognized universally by the medical profession and are identified from blood samples in a clearly scientific way so there is no doubt about a person being an A or an O. It is also universally accepted by courts and medical profession that blood groups can exclude a male as being the father of a particular child whose blood sample is also scientifically determined.

Legal Conclusion: The inclusion of blood grouping tests by an amendment to Rule 35 excludes any other type of blood test under the principle of *inclusio unius exclusio alterius*.

Factual Conclusion: HLA testing is universally agreed as not being able to identify the father and exclude others. For example, as covered in Washington Law Quarterly and New York University Quarterly, actual tests conducted showed that the percentage of probability that a person whose blood was tested was higher in two instances than the person who was actually the father. Therefore, this is absolute lack of unanimity as to the reliability of HLA testing considered as a scientific medical test. *Little v. Streater*, 101 S. Ct. 2202, 1981, 452 U.S. 1, 68 L. Ed. 2d 627, identifies the term "blood groups" as stated above and shows the medical scientific history of the development of "human blood groups", p. 2205. Vol. 20, Santa Clara Law Review, p. 521, establishes a different definition for HLA testing, "because the HLA test detects anti-

gens by using antisera (antibodies), it is known as a serologic test. HLA means Human Leukocyte Antigen.

Conclusion: Blood grouping is a descriptive objective system as distinguished from the HLA system.

We urge that statutory authority is necessary in order to puncture the human body unless, of course, the person volunteers.

We urge the court to reconsider HLA testing as being beyond the terms of Rule 35 which are restricted to blood groups. Certainly taking a blood sample is not a physical examination, therefore, the amendment which included blood grouping within the kinds of examinations that can be ordered is a recognition of that fact. *Beach v. Beach*, 114 Fed. 2d 479 (Dist. of Columbia 1940) recognized blood grouping examinations in the taking of samples for that particular test. This case recognizes the amendment. We have urged above that statutory authority is necessary and means what blood grouping meant at the time of the amendment.

In general, there is no constitutional right preventing the application of Rule 35 to physical and mental examinations and also blood grouping which would include taking a sample. I conclude though that there is no case which says that the Defendant in a paternity case is without constitutional protection against being forced to submit for a blood sample or HLA testing. Under Rule 35 a refusal to submit to a physical or mental examination or a blood grouping test cannot be contempt. We need not worry about constitutional limitations as far as being forceably tested. This does not mean that constitutional

rights do not enter into a consideration of sanctions. Stated otherwise, if there is a constitutional right not to be ordered to submit to a physical examination or a blood grouping test then sanctions could not apply for a refusal to do so. If it were otherwise, a Defendant would be subjected to a type of judicial blackmail which would, in effect, put him under such duress as to destroy his constitutional right to be free of an order requiring him to give a blood sample for an HLA test. A refusal to consent, a constitutional right, for a physical examination or for a blood grouping test is not an exclusion of a constitutional protection of an order to give a blood sample for HLA.

Question: Where and how can we make a distinction?

We submit that it could not be a decision to be taken by Defendant. In other words, one person's claim to a constitutional right would not bring the constitutional protections into existence. It must be something in the nature of the test itself. It has been decided that the taking of a blood sample is not barred in all circumstances by any constitutional protection. This does not mean that under particular circumstances a constitutional provision could act as a bar. The courts have realized the problem of allowing scientific tests as a necessary means to obtaining conviction and also under Rule 35 as a necessary means to securing necessary evidence that could be decisive of the issues. So, the conclusion is, ordering a person to give a blood sample is not barred by the Constitution *per se*, however, we contend that the right to take the blood sample thus extended is an exception, an inroad into the constitutional right to control one's own body. It con-

stitutes an exception *because* the test to which the blood was submitted is susceptible of scientific occurrences by scientific means which can be observed and verified. Furthermore, the tests for which a blood sample has been authorized are all universally accepted by the scientific community or else there is a statute which authorizes the test. When a statute exists it is presumed that the value of the provisions of the statute have been the subject of legislative debate and decision. We conclude, that lacking one of those two principles and acceptance to the constitutional right to control one's own body, which includes his blood, is intact and would bar any intrusion.

In conclusion then because HLA is not legislatively authorized in New Mexico and since there is no community agreement of the scientific or medical community that it is objectively scientific and accurate to identify the alleged Defendant as the father, that the provisions and requirements for making an exception to the constitutional right of privacy has not been fulfilled.

The judgment appealed ordered HLA testing or a default, App. 2.

In the Transcript on Appeal, the preliminary steps looking up to the Order were included. RP 58 the Order, filed October 1, 1982, requiring Richard Rock to submit to HLA is set out. At the hearing of September 13, 1982, in Plaintiff Motion to force HLA upon Richard Rock, Plaintiff's grounds were stated as follows: "What I want this Court to do is Order that Dr. Rock go to the doctor I choose, or that the Court orders to do this testing, give his blood, which this Court can order him to do under the Rules of Civil Procedure, and allow that blood to be used

for the purpose of HLA typing and compared with the blood of Esther Antonio and Rachael Antonio". The foregoing is contained in the transcript for the appeal to the Supreme Court of New Mexico at p. 41 and can be brought to this Court. The Plaintiff did not offer any evidence at all, he merely relied upon the authority of the New Mexico Trial Court under Rule 35. He stated at p. 41 of the transcript that "HLA typing is different than blood testing. And the Supreme Court of New Mexico has said that this Court can order or not, as it sees fit, HLA typing under the Rules of Civil Procedure."

It is clear, therefore, that the basis of the Judgment appealed, App. 2, are Rules 35 and 37 of Civil Procedure. In making his ruling, the lower court expressly relied upon Rule 35, Tr. 91, 92 filed in the appeal and dismissed the argument that HLA was a test of probability based on statistics by saying Tr. 92 "no absolute certainty or surety is a legal requirement in any test that I am aware of, the tests being reasonable, medical probabilities."

The Supreme Court of New Mexico had squarely presented to it on the appeal of the November 27, 1982 Order, App. 2, the legality and constitutionality of ordering HLA testing under Rule 35 enforced by the sanctions of Rule 37. See Index to Appellants Brief to Supreme Court of New Mexico, App. 6, where Points One, Three, Four, and Five all cover the forced HLA testing Order with the judicial decree of default unless he submitted, App. 2.

HLA testing results as stated create a false impression that the stated percent e. g., 99% means that the defendant is 99% certain to be the father. In our adversary proceeding it could hardly be expected that this impres-

sion could not be advanced. In truth, the HLA percentage is merely an exclusion of 99% of the male population as the potential father leaving one percent as the eligible fathers. It is a statistical test, not a scientific one. Even the group from which the statistics are drawn is not a scientific array. It is a random selection of males, the result of which can vary with race and other factors.

All the advocates of HLA say that accessibility to the mother is a fact whereas HLA is not a fact. The great probative value comes from a combination of the two. We submit that this evidence constitutes a dangerous threat to freedom and is not "due process". If the "facts" are not convincing, why should gambler's "odds" supply the deficiency. There is not one single item in all of HLA which can possibly link the defendant to the conception of the particular person. Yet, the New Mexico Courts have said that we allow probability evidence on other issues. This is a subtle but erroneous comparison, the fallacy of which is illustrated by applying it to other types of court cases. Can a compilation of statistics, which shows that a high percent of indicted persons are convicted, be evidence against a criminal defendant? Can a defendant charged with a crime wherein blood sample could be compared with a blood sample at the scene have his presence at the scene evidenced by an HLA test even supposing that test would place us in the $\frac{1}{4}$ of 1% of the persons whose blood would match the blood sample at the scene?

Remembering that blood tests are scientifically exclusionary but only probability for inclusion, are we not entering into a system of evidence where guilt or innocence depends entirely on chance? The medical probability evi-

dence used in civil and criminal cases differs in its very issue from HLA statistics to convict a person who happens to qualify only because he is in the "group". How could we assume that all of the 1% are not on the Navajo Reservation as in New Mexico? There is no way of saying where the individuals in the group are located. As an illustration, supposing the evidence in a murder trial shows the killer to have been "oriental", "male" and "6 feet, 8 inches tall".

A statistical survey shows that only 1/100 of 1% of the population meet that qualification. Assuming the defendant was in the area at the time of the crime, could that statistic be evidence that he was the perpetrator of the crime? In essence, HLA testing to prove paternity amounts to evidence that because the vast majority of males could not be the father that this is legal proof that the defendant is, in fact, the one to pay for the illegitimate child and thereby relieve the state of its obligation under 42 U. S. C. § 654 to find the father or else be deprived of Federal Funds.

This is evident by the fact that the evidence in this case shows that when the Plaintiff asked for relief for the child, the welfare worker demanded as a condition that the name of the father be disclosed. For other reasons she was denied relief.

CONCLUSION

For the reasons stated above, we request a Writ of Certiorari to the Supreme Court of New Mexico.

Respectfully submitted,

EUGENE E. KLECAN

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Attorney for Respondent

App. 1

APPENDIX

No. _____

IN THE SUPREME COURT OF THE STATE
OF NEW MEXICO

ESTHER ANTONIO,
Plaintiff,
vs.

RICHARD ROCK,
Defendant.

COUNTY OF BERNALILLO

Harry E. Sttowers, Jr., District Judge
SKELETON TRANSCRIPT
Klecan & Santillanes, P.A.

Attorney for Plaintiff Klecan & Santillanes, P.A.
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No. DR 79-01505

IN THE DISTRICT COURT OF THE STATE
OF NEW MEXICO
COUNTY OF BERNALILLO

ESTHER ANTONIO,
Plaintiff,
vs.

RICHARD ROCK,
Defendant.

ORDER

(Filed November 24, 1982)

THIS MATTER having come before the Court on the Plaintiff's Motion for Default Judgment, or in the alternative sanctions, the Defendant's Motion to Strike and the Defendant's Motion to Quash, the Plaintiff having appeared by her attorney LEO C. KELLY, the Defendant having appeared personally and by his attorney, Eugene E. Klecan, the Court having heard the arguments of Counsel and being otherwise advised in the premises FINDS:

1. That the Defendant previously failed to appear for HLA and Red Blood Cell Typing on October 21, 1982, as ordered by the Court by Order entered October 18, 1982.

2. That the Plaintiff failed to appear for HLA and Red Blood Cell Typing on November 15, 1982, at the hour of 1:00 p.m., as ordered by the Court by Order entered November 12, 1982.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the following sanctions will be applied:

1. Beginning today, November 22, 1982, the Defendant Richard Rock will be assessed One Thousand and 00/100 Dollars (\$1,000.00) a day for the next ten days. If the Defendant appears within that ten day period for HLA and Red Blood Cell Typing, then that sanction will be dropped and dismissed. If the Defendant fails to appear within the prescribed ten day period, then the \$10,000.00 for the ten days will be imposed as Court costs.

2. If the Defendant fails to appear for HLA and Red Blood Cell Typing as above ordered, then the Court will

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enter Default on the Paternity issue and set this case for a hearing on the matters of Support and Attorney's fees.

3. That the Plaintiff's attorney, LEO C. KELLY, be and he hereby is awarded Judgment against the Defendant, Richard Rock, in the amount of Five Thousand and 00/100 Dollars (\$5,000.00) as partial attorney's fees.

IT IS FURTHER ORDERED that the Defendant's Motion to Strike and Defendant's Motion to Quash be, and they hereby are, denied.

11-24-82

/s/ Harry E. Stowers, Jr.
District Judge

SUBMITTED BY: /s/ Leo C. Kelly
Attorney for Plaintiff

To all of which Defendant objects:

FOR BY: /s/ Janet Santillanes,
Eugene E. Klecan
Attorney for Defendant

No. DR-79-1505

IN THE DISTRICT COURT OF THE
STATE OF NEW MEXICO
COUNTY OF BERNALILLO

ESTHER ANTONIO,

Plaintiff,

vs.

RICHARD ROCK,

Defendant.

NOTICE OF APPEAL

(Filed November 29, 1982)

COMES NOW the Defendant, Richard Rock, and hereby appeals to the Supreme Court of New Mexico from

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the Order and Final Judgment entered on November 24, 1982, against the Defendant, Richard Rock, and in favor of the Plaintiff Esther Antonio, and in favor of the District Court of Bernalillo County, and in favor of one Leo Kelly, and also as a Final Order and Judgment of contempt in behalf of the Honorable Harry Stowers, Judge of the District Court of Bernalillo County and against the Defendant, Richard Rock.

KLECAN & SANTILLANES, P.A.

By: /s/ Eugene E. Klecan

Attorney for Defendant

520 Sandia Savings Building

Albuquerque, New Mexico 87102

(505) 243-7731

I hereby certify that a true copy
of the foregoing was mailed to
opposing counsel of record, Leo Kelly,
this 29th day of November, 1982.

/s/ E. E. Klecan

App. 5

No. 14704

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

ESTHER ANTONIO,

Plaintiff/Appellee,

vs.

RICHARD ROCK,

Defendant/Appellant.

APPELLANT'S BRIEF-IN-CHIEF

Civil Appeal from the District Court
of Bernalillo County

The Honorable Harry E. Stowers, Judge

Attorney for Defendant/Appellant:

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(p. ii) **STATEMENT OF THE CASE**

Esther Antonio, as mother of Rachel Antonio, filed a paternity case for herself but not for the child, on April 4, 1979, under N.M.S. 1978 § 40-5-1 et seq. against Richard Rock, as alleged father, in District Court for Bernalillo County, New Mexico. The matter came before the Court, The Honorable Harry Stowers presiding, on November 24, 1982, on Plaintiff's Motion for Default Judgment or in the alternative "sanctions"; also, on Defendant's Motion to Strike and Motion to Quash. The Court made two findings, that the Defendant had failed to appear for HLA testing and ordered that Defendant "will be assessed One Thousand and 00/100 Dollars (\$1,000.00) a day for the next ten days" as sanctions. The Order provided for dropping the "\$1,000.00 per day" if Defendant submitted. The Order said that Default would be entered on the paternity issue if Defendant did not submit to HLA. The Order entered "Judgment" for \$5,000.00 attorney's fees against the Defendant and to "the Plaintiff's attorney Leo C. Kelly" personally, who was not a party up to that time. Defendant appealed on November 29, 1982 (R. P. 80). Plaintiff's attorney, Leo C. Kelly, sent out an execution against the Defendant for himself for \$5,000.00 plus interest (R. P. 81) on December 3, 1982. Defendant posted a Supersedeas Bond (R. P. 87) on December 15, 1982.

(p. iii) **STATEMENT OF PROCEEDINGS**

Plaintiff filed a Motion for HLA Blood Testing in May, 1982 (R. P. 5) which was denied on June 7, 1982 (Tr. 4, R. P. 30). The Court entered an Order requiring De-

fendant to submit to HLA testing on October 1, 1982. On September 10, 1982, Defendant had moved for a definite trial setting sometime after November 11, 1982 (R. P. 39). On October 18, 1982, J. Stowers entered an Order that Plaintiff, Defendant and the child present themselves for HLA blood testing before Dr. Troup on October 21, 1982, at BCMC Blood Bank (R. P. 62). Plaintiff made a Motion for Default Judgment on the issue of Paternity on October 25, 1982 (R. P. 63). On October 18, 1982, J. Stowers entered an Order that the same three present themselves at BCMC for HLA testing on October 21, 1982. In November, 1982, Defendant filed a sworn statement explaining why he did not appear on October 21, 1982, which included the fact that the Supreme Court of New Mexico had taken jurisdiction on October 21, 1982 (R. P. 65, 66). On November 12, 1983, J. Stowers entered an Order requiring Defendant to appear for HLA testing on November 15, 1982 stating that a failure to appear would result in sanctions in accordance with the provisions of the Rules of Civil Procedure. The Order stated that the Motion for Default Judgment was "taken under advisement" (R. P. 69). On November 19, 1982, Defendant filed a Motion to Strike a setting for "Defaults-Merits", (R. P. 75) claiming a denial of "due process". The Order which included a Judgment to Leo Kelly personally for \$5,000.00 was filed (p. iv) November 24, 1982, and Notice of Appeal was filed on November 29, 1982.

On the question of blood testing Appellant points out that the original denial of the Motion to compel blood testing was stated to be on the grounds of lack of jurisdiction. In an Extraordinary Writ the Supreme Court of New Mexico said that J. Stowers *did* have jurisdiction to hear

the Motion which explains why the matter came up again. In between Plaintiff's two Motions on the HLA testing (R. P. 5 and 19) Defendant had moved for a Dismissal based on Statute of Limitations and Laches (R. P. 7) which was denied (R. P. 32) as was his Motion for a separate trial on the issues of the Statute of Limitations (R. P. 27). There were two sets of Courts Findings and Conclusions which are challenged here. The First Findings and Conclusions, Point —, appears at RP 52, 53 and Findings 1, 4, 5 are challenged. It is pointed out the challenge to jurisdiction includes a challenge to jurisdiction over the person by the District Court of Bernalillo County. Conclusions 1, 2, 3 are challenged. Tr. 46-90 contains the only evidence on this point and fully supports our challenge to the Courts Findings and Conclusions. In addition, Appellant claims error by reason of Court's failure to give his Requested Findings and Conclusions on this testimony (R. P. 41-43). The Order of November 24, 1982, contains two statements after Findings; both of which are challenged as error (R. P. 78). The sworn statement of Defendant (R. P. 65, 66) fully supports the claim of error. Proceedings in Court on November 5, 1982 (p. v) establish the Findings as error (Tr. 120-159). Also second Tr. 1-22 shows that Judge Stowers was entering a contempt order which is expressly appealable.

(p. 1) POINT ONE: THE JUDGMENT VIOLATED
RULE 35 AND WAS A CONTEMPT ORDER
IN DIRECT VIOLATION OF RULE 35. ALSO
IT VIOLATES APPELLANT'S CONSTITU-
TIONAL RIGHTS.

Rule 35 provides expressly for physical and mental examination including blood group testing. Rule 37—Sanctions, is the same.

Conclusion: State and Federal statutory authority for physical examination including blood grouping—this would include the right to order a blood sample—is a false application to this case. The Order as signed is solely for HLA testing. This is different from blood grouping. Blood groups are recognized universally by the medical profession and are identified from blood samples in a clearly scientific way so there is no doubt about a person being an A or an O. It is also universally accepted by courts and medical profession that blood groups can exclude a male as being the father of a particular child whose blood sample is also scientifically determined.

Legal Conclusion: The inclusion of blood grouping tests by an Amendment to Rule 35 excludes any other type of blood test under the principle of *inclusio unius exclusion alterius*.

Factual Conclusion: HLA testing is universally agreed as not being able to identify the father and exclude others. For example, as covered in Washington Law Quarterly and New York University Quarterly, actual tests conducted showed that (p. 2) the percentage of probability that a person whose blood was tested was higher in two instances than the person who was actually the father. Therefore, this is absolute lack of unanimity as to the reliability of HLA testing considered as a scientific medical test. *Little v. S'reater*, 101 S.Ct. 2202 (1981), identifies the term "blood groups" as stated above and shows the medical scientific history of the development of "human blood groups", pg. 2205. Vol. 20, Santa Clara Law Review, pg. 521, establishes a different definition for HLA

testing "because the HLA test detects antigens by using antisera (antibodies), it is known as a serologic test. HLA means Human Leukocyte Antigen.

Conclusion: Blood grouping is a descriptive objective system as distinguished from the HLA system.

We urge that the statutory authority is necessary in order to puncture the human body unless, of course, the person volunteers.

In this case the district court had passed its ruling under Rule 35 and we urge the Court to reconsider HLA testing as being beyond the terms of Rule 35 which are restricted to blood groups. Certainly taking a blood sample is not a physical examination, therefore, the Amendment which included blood grouping within the kinds of examinations that can be ordered is a recognition of that fact. *Beach v. Beach*, 114 F.2d 479 (Dist. of Col. 1940) recognized blood grouping examinations in the taking of samples for that particular test. This case recognizes the Amendment. We have urged above that statutory authority is necessary and means what (p. 3) blood grouping meant at the time of the Amendment.

It is noteworthy that Rule 35 requires that "good cause" must be shown for the examination. This would be true even in blood grouping. In our case, "good cause" would include factual scientific findings, the scientific reliability of HLA. In effect, the Rule 35 requirement of "good cause" has been disregarded. The United States Supreme Court in *Schlaugenhaut v. Holder*, 379 U.S. 104 (1964) stressed the importance of a hearing to establish good cause and it was noted in that Opinion that the type

of test and its scientific acceptance would be one of the elements necessary for a factual determination of "good cause". We had such a hearing and good cause was not shown Tr. 36-93. Good cause as defined by the Supreme Court cannot be based on the fact that the Court might think the test could be of some assistance in determining the outcome.

At this point, the principles laid down in *Frye v. U.S.*, Tr. 9, 293 Fed. 1013 become significant. It states that scientific evidence must be "sufficiently established to have gained general acceptance in the particular field in which it belongs". We had thought that the evidentiary hearing was for the purpose of showing whether there has been a final acceptance of HLA. Tr. 36-93. *Frye*, supra, we feel, is not being followed in this case since all the evidence produced for this Court showed that it was not accepted. A judicial opinion, that it was, has set aside the requirements of *Frye* and makes any claimed scientific discovery evidence in a case dependent upon the personal opinion of the trial judge. Tr. 92. (p. 4) Throughout this Point we emphasize that blood grouping tests and HLA tests are different legally and scientifically. There are possible misunderstandings as to the position of the New Mexico Supreme Court in this case. (Tr. 37). First, a conclusion that the Supreme Court has recognized HLA testing as admissible evidence in this cause because it granted the District Court jurisdiction to hear the Motion to order HLA, is not warranted. The language used shows the Supreme Court *only* granted jurisdiction to hear the Motion (Tr. 37). It did not rule that it is admissible. All this Court meant then was to recognize that the *Frye* case

does permit the law to advance with new scientific discoveries, but not without a hearing as to their general acceptability as scientific truths. This is distinguished from a ruling of courts without supporting evidence which violates due process. Judge Stowers had no evidence to support his Findings. (R. P. 52, 53; Tr. 36-93).

The second conclusion about this Court's position is that it does not mean that they approved the *taking* of the test. Jurisdiction was present to conduct the hearing below. A court's error in making findings of fact is not a jurisdictional error. It is properly before this Court now on Appeal. We assert that the Court had erred in refusing the only evidence presented at the hearing. (Tr. 46-90). In addition, the case of *Schlaugenhauf*, supra, (p. 5) clearly develops the idea that prohibition is not the proper remedy to take against a trial court's ruling under Rule 35 but the majority of the Supreme Court, under a strong dissent, took jurisdiction because they wanted to enlighten all Federal Courts on necessity of a hearing under the "good cause" requisite of Rule 35, even though they admitted that prohibition does not lie normally. Our Supreme Court no doubt ruled that this Court's ruling ordering the test is probably a matter of appeal. They might also have wanted to know whether we would agree to it and does avoid the issue we are now presenting.

Conclusion: We believe that statutory authority is necessary for the forced use of HLA testing and that it is lacking in this case. As a correlary we assert that it is impermissible judicial legislation to substitute a court order for a legislative act. Tr. 92. Even if permissible by the Court, without legislative approval, the principles

of the *Frye* case must be followed and were not followed in this case.

Because of time limitations, we will bypass a discussion of the U. S. Supreme Court cases dealing with blood samples, physical examinations and the constitutional tests based thereon both Federal and State in the U. S. Supreme Court. There are five important cases which I will just mention:

1. *Hovey v. Elliott*, 167 U. S. 409, 42 L. Ed. 215, 17 S. Ct. 841, repugnant to due process to strike the Defendant's pleadings for failure to pay into the Court Registry a sum of money which had been allegedly obtained.

(p. 6)

2. *Walter Cabinet Co. v. Russell*, 95 N. E. 462 (Ill.) held that a court could not take away Plaintiff's property and give it to another nor deprive him of his civil rights for refusal to obey an order of the court.
3. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. Ed. 530, 29 S. Ct. 370.
4. *Schmerder v. California*, 16 L. Ed. 2d 908, held that the result of a blood alcohol test forcefully taken could be offered in evidence but 1) the test was authorized by State law, 2) taken at the time of the arrest, 3) blood alcohol is unassailable as a valid test and the results are measured by the statute.
5. *Sibach v. Wilson*, 312 U. S. 1, 85 L. Ed. 479, 61 S. Ct. 422, held discovery rules to be procedural. Plaintiff was held in contempt and this was va-

cated as violating Rule 35 but the court said that the other sanction could be available but did not say which one and did not say that the trial judge had to impose sanction. The Plaintiff in this personal injury act was ordered to submit to a physical. This case decided that the constitutional right of privacy did not afford a defense to the discovery Rule 35.

In our Supreme Court there is the case dealing with taking a blood sample for blood alcohol testing from an unconscious accused. (p. 7) The U. S. Supreme Court refused to declare it unconstitutional; however that was based on a refusal to apply the 14th Amendment to this type of test. The refusal to apply the 14th Amendment has been changed by the U. S. Supreme Court. I will bypass a discussion of the above and summarize the constitutional protection as follows. In general, there is no constitutional right preventing the application of Rule 35 to physical and mental examinations and also blood grouping which would include taking a sample. We conclude though that there is no case which says that the Defendant in a paternity case is without constitutional protection against being forced to submit for a blood sample or HLA testing. Under Rule 35 a refusal to submit to a physical or mental examination or a blood grouping test cannot be contempt. We need to worry about constitutional limitations as far as being forceably tested. This does mean that constitutional rights do enter into a consideration of sanctions. Stated otherwise, if there is a constitutional right not to be ordered to submit to a physical examination or a blood grouping test then sanctions could not apply for a refusal to do so. If

it were otherwise, a Defendant would be subjected to a type of judicial blackmail which would, in effect, put him under such duress as to destroy his constitutional right to be free of an order requiring him to give a blood sample for an HLA test. A refusal to consent, as a constitutional right, for a physical examination or for a blood grouping test is not an exclusion of constitutional protection from an order to give a blood sample (p. 8) for HLA. Common law against invasion of the body, Rule 35, makes an exception but a limited one.

Question: Where and how can we make a distinction?

It could not be a decision at the free election of Defendant. In other words, one person's claim to a constitutional right would not bring the constitutional protections into existence. It must be something in the *nature of the test itself*. It has been decided that the taking of a blood sample is not barred in all circumstances by any constitutional protection e.g. blood grouping. This does not mean that under other circumstances a constitutional provision could not act as a bar, e.g. HLA. The Courts have realized the problem of allowing scientific tests as a necessary means to obtaining conviction and also under Rule 35 as a necessary means to securing necessary evidence. So, the conclusion is, ordering a person to give a blood sample is not barred by the Constitution per se, however, we contend that the right to take the blood sample is an exception; an inroad into the constitutional right to control one's own body. It constitutes a valid exception *because* the test to which the blood was submitted is susceptible of universally accepted scientific conclusions by scientific means, e.g. blood grouping. Blood grouping tests, for which a blood sample has been authorized, are

all universally accepted by the scientific community or else there is a Statute which authorizes the test. When a statute exists it is presumed that the value of the provisions of the Statute have been the subject of legislative (p. 9) debate and decision. We conclude, that lacking one of those two principles as an exception, the constitutional right to control ones own body, which includes his blood, is intact and would bar any intrusion.

In conclusion then because HLA is not legislatively authorized in New Mexico and since there is not community agreement of the scientific or medical community that it is objectively scientific and accurate to identify the alleged Defendant as the father, that the provisions and requirements for making an exception to the constitutional right of privacy has not been fulfilled. *Little v. Streater*, supra.

The one attempt to establish scientific background of accuracy and scientific method produced a contrary result in this case. Tr. 46-90. Therefore, in this case, there is a constitutional lack of due process behind the order and the constitutional right to privacy is intact and is advanced herein.

We submit then this combination bars the application of Rule 35 and "good cause" has not been shown as is required under Rule 35. *Schlaugenhauf v. Holder*, 379 U. S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234. In the above case the Supreme Court of the United States said, in effect, that if a physical examination is to be ordered, in most cases there must be a hearing as to the nature of the test or examination. The requirement of "good cause" under Rule 35 is the summation of constitutional objec-

tions - 1) due process and 2) right of privacy. The right of privacy is not outside the U. S. Constitution. (p. 10) See *Roe v. Wade*, 410 U. S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705.

We now go to the recent opinion filed September 30, 1982, *McKay v. Judge Thomas Davis*. N. M. Bar Bull., Vo. 21, No. 42. That case dealt with the breath test in a DWI charge. The statute creates a right to refuse to take breath tests. The Defendant wrongfully contended that the statutory right to refuse was a constitutional right. As pointed out above the Constitution does not protect him. This is not the same as saying that there is no constitutional right in a different case such as blood samples for HLA. The Defendant also contended that the statutory right to refuse created a right to bar the refusal as evidence. Judge Payne disagreed. In doing so, he discussed *State v. Wilson*, 92 N. M. 54, which case was reversed because there was a forcible testing contrary to statute. Again, the right to refuse granted by a statute is not a right to bar evidence of a refusal to be tested. That is all that *McKay v. Davis*, supra, decides.

The foregoing were criminal cases. They are distinguished from the present case by virtue of the fact that the test itself was an object of a legislative act. In our case, there is no legislative act authorizing HLA. This leads us to the question of sanctions, and we repeat our premise stated above, that Rule 35 would be unconstitutionally applied if sanctions were imposed for a refusal to submit to a test even though ordered by the trial judge. This prompts the question—is the court without power to enforce its own decrees. As an answer, Rule 35 (p. 11) expressly states that a refusal to submit to a physical ex-

amination, including blood testing, is not a contempt, therefore it is not an affront to the court itself. This is an admission that personal rights are involved and is a recognition of personal rights. It is not a confrontation between court and Defendant by the expression of contempt. Therefore, there is no demeaning of the Order or the court, as its discretion and sanction are clearly discretionary to say that sanctions just do not apply under these circumstances. In other words, the court says "I recognize the position of the Defendant and his right of his own body and his refusal to submit his blood for a test which is not scientifically established as reliable in identifying him as the actual father." We have stated above that there are constitutional and legal bars to forcing the test and the same constitutional rights bar sanctions. The constitutional rights are a lack of due process and the constitutional right of privacy and the absence of a legislative act authorizing HLA testing. This later distinguishes the case from blood test for blood alcohol and blood grouping.

(p. 12) POINT TWO: IT WAS ERROR TO GIVE
JUDGMENT FOR \$5,000 TO LEO C.
KELLY

"It was error to include judgment in favor of Leo Kelly in the sum of \$5,000 as partial attorney's fees", R. P. 83. There are other appeal points listed. Attention is also directed to the fact that a Supersedeas Bond was filed in District Court on December 15, 1982, in the sum of \$8,000 wherein the "surety jointly and severally executed this bond to said Leo Kelly in the sum of \$8,000, an amount in excess of such judgment, said judgment being \$5,000." R. P. 87. Attention is also directed to Notice of Appeal,

R. P. 80, which states Richard Rock appeals from the Order "in favor of one Leo Kelly" and mentions other grounds of appeal.

Attorney Leo Kelly has a final order to himself against Richard Rock and a dismissal of the appeal under the guise of a representation of Esther Antonio would permit him to recover on the bond or by executing the \$5,000 awarded to him by the Order of November 24, 1982. R. P. 79. That Order says that "he hereby is awarded judgment against the Defendant Richard Rock". Leo Kelly is not a party to this case on any other issue and his only appearance as a party is to secure a Judgment against the Defendant in the sum of \$5,000.

It has long been established without exception that attorney's fees may not be awarded to the attorney as a person. To make a party to the lawsuit subject to execution at the (p. 13) instance of an attorney on the opposing side is contrary to long established principles of professional representation. The fact that he would personally obtain a Writ of Execution, R. P. 81, is documentary evidence of violation of long established precedence governing an attorney's error in the lawsuit. It makes the litigation a personal affair and would make the Defendant subject to all methods of collection of a judgment, including executing judgment liens, etc. No precedent exists for this.

Lloyd v. Lloyd, 60 N. M. 441, 292 P. 2d 121, states universal law that an attorney does not have the right to recover a judgment against the husband in an independent action. That case also refers to the workmen's compensation statute which was interpreted to require an

award for attorney's fees to be made to the claimant and "not to his attorney", citing *LaRue v. Johnson*, 47 N. M. 260, 141 P. 2d 321.

There is an even more fundamental reason why attorney's fees should not have been awarded in the Order of November 24, 1982, even if they had been made to the Plaintiff, Esther Antonio. The Statute under which this action was brought, 40-5-1, et seq. N. M. S. A., 1978, R. P. 1, permits reasonable attorney's fees to be awarded but only in the event of a final determination on paternity. There is no provision for partial attorney's fees. Victory is an absolute requisite for attorney's fees awards. It would be not only against every precedent but also against public policy as an encouragement to the filing of paternity (p. 14) litigation if the court could award to the Plaintiff partial attorney's fees as a means of litigation against an alleged father. This same principle applies to workmen's compensation cases. An employer and his compensation carrier cannot be forced to pay attorney's fees without an award. A divorce case presents a different situation not only because an award for a wife to prepare an adequate defense is authorized by Statute but also because in a divorce case there is an existing legal relationship which is sought to be terminated. The existing community is a basis for authorizing an award for attorney's fees so that the divorce proceeding may be an equal procedure. Sec. 40-5-1 concludes as follows: "In addition to the judgment for support, there may be a judgment for reasonable attorney's fees." There is no provision allowing an award until paternity is decreed against the Defendant.

- (p. 15) POINT THREE: THERE WAS ERROR IN THE COURT'S FINDINGS AND CONCLUSIONS IN AN ORDER TO SUBMIT TO HLA TESTING - SEPTEMBER 23, 1982 (R. P. 52)

The evidence does not support the Findings and the Findings, therefore, do not support the Conclusions of Law. The hearing was for the purpose of determining the reliability of HLA testing. No evidence was offered by the Plaintiff except reference to a case where it had been used but the circumstances of any of those cases do not equal the instant case for the reason that force was being applied judicially against the alleged father. All the evidence in the case was furnished by the Defendant Dr. Rock as an expert and there would be no purpose in the hearing if the testimony that brought us to Court is disregarded. Therefore, the whole purpose of the hearing was vitiated. (Tr. p. 46-90). *Getz v. Equitable Life Assurance Society of the United States*, 90 N. M. 195, 561 P. 2d 468; *Olivas v. Sibco, Inc.*, 87 N. M. 488, 535 P. 2d 1339.

- (p. 16) POINT FOUR: THERE WAS ERROR IN THE COURT'S FINDING GIVEN IN AN ORDER ON NOVEMBER 24, 1982 (R. P. 78)

The Court found in evidence that the Defendant was in contempt which is expressly prohibited by the Rules of Civil Procedure as applied to an Order requiring a physical examination. It was a contempt finding, or a threat to hold him in contempt, even though concealed under the term "sanctions". In addition, the Findings themselves were false and not supported in the evidence. (See Defendant Rock's Affidavit explaining how and why he could

not and did not comply with the Court's first Order, R. P. 73). Such a drastic sanction cannot ever be applied except to an extremely gross failure to comply with the Court's decree. The facts in this case make it so that this would be impossible. There was no finding of bad faith and no evidence of bad faith. *Getz v. Equitable Life Assurance Society of the United States*, 90 N. M. 195, 561 P. 2d 468; *Olivas v. Sibco, Inc.*, 87 N. M. 488, 535 P. 2d 1339.

(p. 17) POINT FIVE: THE TRIAL COURT'S USE
OF RULE 35 THREATENING A DE-
FAULT JUDGMENT IS ERRONEOUS

This makes the imposition of the sanctions imposed by the Order of November 29, 1982, (R. P. 80) erroneous and also an invasion of Defendant's constitutional rights. This matter is not without precedent and the case of *Baker v. Limber*, 647 F. 2d 912 supports our position and is applicable in many respects. The decision holds that an assertion of a constitutional protection shields a person from *compulsory discovery* and specific sanctions of a default judgment against him. In *Baker v. Limber*, *supra*, there was a different constitutional protection from the instant case. There it was self-incrimination; here it is protection against Defendant being forced to submit his body to puncture and forceable withdraw of blood. Also we cannot emphasize this enough—there was a lack of "due process" in its constitutional sense because the hearing wherein the test was ordered by J. Stowers produced an Order which violated "due process", Art. II, Sec. 18, of the New Mexico Constitution and 14th Amendment, U. S. Constitution, because there was no evidence to sup-

port the Finding (Tr. 92, R. P. 52, 53) that the HLA system is a valid test to be used in paternity actions. *Little v. Streater*, supra. See also *The Black Panther Party v. Smith*, 661 F. 2d 1243 (D. C. Ct. of Appeals, 1981) wherein two principles are discussed which support Appellant's position. First, "Sanctions can be imposed (p. 18) for failure to obey order compelling discovery only if that order was justified". As applied here, the Order of November 24, 1982 (R. P. 78, 79) is based on the Court's Findings and Conclusions of September 23, 1982 (R. P. 52, 53) that "HLA testing is of sufficient scientific reliability to be used as probative evidence in the litigation involving the question of paternity". Appellant has argued the lack of factual support for the same herein. His requested Findings below are found at R. P. 41, 42, 43. Appellant submits therefore that the "sanctions" were improper because the Findings do not justify it.

Black Panther Party v. Smith, supra, also says: "Ordinarily extreme sanction of Dismissal is appropriate only when party has displayed callous disregard for its discovery obligations or when it has exhibited extreme bad faith". The Order imposing sanctions, which is the Order appealed here, erroneously blamed Richard Rock for failure to appear at a previous scheduling for blood testing. (R. P. 78, 79). The Supplemental Transcript which appears at the end shows that J. Stowers drew conclusions about prior failures which were inconsistent with the Appellant's conduct. (Supp. Tr. 1-22). The foregoing proceedings and Richard Rock's affidavit explaining the inability to attend prior scheduled tests show clearly that there was no bad faith at all and show that there was *not a callous indifference to the Court's prior scheduling*

dates. (R. P. 73, 75). The foregoing pleadings entitled Affidavit in Support of Motion to Quash and Motion to Strike (R. P. 75, 76) negates "bad faith" (p. 19) and "calious disregard". There is nothing to dispute the truth contained in the affidavit. (R. P. 75, 76).

Threatening a Default and then getting Defendant's compliance should not destroy the Defendant's rights to be protected from the improper use of sanctions which were really a concealed contempt citation. If the *Black Panther Party*, supra received that protection in Washington, D. C., so should Richard Rock in New Mexico.

Why is it that radical organizations and people receive such careful consideration from the courts as their constitutional right, and hard-working, conservative members of our American communities seem not to receive equal consideration. *The Black Panther Party* case, supra, contains fifty-two (52) pages of careful consideration of Rule 37, dealing with dismissal, sanctions, and discovery procedure.

The Defendant, Rock, was placed under great judicial pressure by virtue of the "choices" prescribed to him, and merits a careful consideration of his rights.

(p. 20) POINT SIX: THERE IS NO JURISDICTION OVER THE PARTIES AND SUBJECT MATTER

Lack of jurisdiction can be raised at any time. The Enabling Act for the State of New Mexico is involved in this Appeal. New Mexico Statutes 1978 Annotated, Historical Documents, Volume I, Page 106:

The following regulation of the Department of the Interior is involved in the Petition: 25 C. F. R. § 11.30

states: "The court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

The following provision of the Navajo Tribal code is involved: "By resolution CJA-1-5, the Navajo Tribal Council adopted as Tribal Law the regulation of the Department of the Interior contained in 25 C. F. R. § 11.30 which states: The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

Within the field of domestic relations, the New Mexico Supreme Court in 1972 spoke in *Natewa v. Natewa*, 84 N. M. 69, 499 P. 2d 691 and cited the Department of Interior's resolution that the Court of Indian Offenses shall have jurisdiction of all suits brought to determine the Paternity of the child and to determine the support of a child.

(p. 21) CONCLUSION: We ask a reversal and dismissal of the judgment below.

KLECAN & SANTILLANES, P.A.

By: EUGENE E. KLECAN (signed)
Eugene E. Klecan
Attorney for Appellant
520 Sandia Savings Building
Albuquerque, New Mexico 87102
(505) 243-7731

I HEREBY CERTIFY that a true copy
of the foregoing was mailed to
opposing counsel of record this
23 day of April, 1983.

/s/ E. E. KLECAN

App. 28 .

No. 14704

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

ESTHER ANTONIO,

Appellee,

vs.

RICHARD ROCK,

Appellant.

MOTION TO DISMISS

COMES NOW the appellee, Esther Antonio, by her attorneys LILL & KELLY, P.A., (LEO C. KELLY), and moves the Court for an order dismissing the within captioned appeal and as grounds therefor states that the order appealed from is not ripe for appellate review.

LILL & KELLY, P.A.

By LEO C. KELLY
Attorney for Appellee
300 San Mateo N. E., Suite 620
Albuquerque, New Mexico 87108
(505) 262-1905

I hereby certify that a true
and correct copy of the fore-
going pleading was mailed to oppo-
sing counsel of record this _____
day of May, 1983.

APPELLEE'S BRIEF

STATEMENT OF FACTS

Plaintiff Esther Antonio filed suit against Richard Rock alleging that he is the father of her child Rachael Antonio. Rock denies the fact of Paternity.

STATEMENT OF THE CASE

Plaintiff filed a First Amended Complaint against Defendant on August 30, 1979 (RP 1). Defendant filed a Motion to Dismiss on September 7, 1979. That Motion was denied on December 14, 1979. Defendant filed an Answer to First Amended Complaint on September 7, 1979 (RP 3).

Defendant filed a Petition for Writ of Prohibition in this Court on December 14, 1979 (No. 12845). This court issued an Alternative Writ on December 19, 1979. Rock filed a Brief in Support of Petition for Writ of Prohibition on January 10, 1980. Antonio filed an Answer to Brief in Support of the Petition for Writ of Prohibition on January 21, 1980. By Order entered January 30, 1980, this court quashed the Alternative Writ issued on December 19, 1979. The Petition for Writ of Prohibition was sought on the grounds that "... the District Court lacks jurisdiction over the subject matter and over the persons involved."

Rock filed another Petition for Writ of Prohibition in this court on August 14, 1981. (No. 13,813). By Order entered August 19, 1981, the court denied Rock's application. On August 31, 1981, Rock filed a Notice of Appeal to the Supreme Court of the United States from the final order of the Supreme Court of New Mexico entered Au-

gust 19, 1981. (No. 81-1034 In the Supreme Court of the United States, October Term 1981. State of New Mexico, ex rel Richard Rock v. Hon. Harry E. Stowers, Jr.) Rock filed a Jurisdictional Statement and Antonio filed a Motion to Dismiss. The appeal was dismissed by Order entered April 5, 1982.

Antonio filed a motion for HLA and red blood cell typing on May 24, 1982. (RP 5). That motion was denied on June 24, 1982. (RP 30). On June 24, 1982, Antonio filed a Petition for Writ of Mandamus in this court. (No. 14377). An Alternative Writ was issued on the same day. The Alternative Writ was made permanent on August 4, 1982.

On October 18, 1982, the district court ordered Rock to appear for HLA and red blood cell typing on October 21, 1982 (RP 64). Rock failed to appear. Rock filed a Petition for Writ of Prohibition in this court on October 20, 1982 (No. 14,580). That petition was denied.

On October 25, 1982, Antonio filed a Motion for Default Judgement because of Rock's failure to appear for HLA and red blood cell typing (RP 64). On November 12, 1982, the court ordered Rock to appear on November 15, 1982 for HLA and red blood cell typing (RP 69). The court took Antonio's motion for default judgement under advisement. Dr. Rock failed to appear (RP 78).

On November 24, 1982, the district court entered the Order appealed from (RP 78). Rock did appear for HLA and red blood cell typing as ordered and judgement was entered in favor of Antonio's attorney for \$5000.00 as partial attorney's fees.

Notice of Appeal was filed November 29, 1982 (RP 80).

Antonio filed a Motion to Amend Order on December 8, 1982 (RP 82), seeking to have the judgement amended to award judgement for attorney's fees to the plaintiff rather than to the plaintiff's attorney. On December 22, 1982, Judge Thomas Mescall denied plaintiff's motion by letter filed of record (RP 92).

ARGUMENTS AND AUTHORITIES

THE DISTRICT COURT ERRED IN AWARD- ING ATTORNEY FEES TO PLAINTIFF'S ATTORNEY

It is absolutely clear in New Mexico that an award of attorney fees must be made to the party involved and not to the attorney for the party. *Lloyd v. Lloyd*, 60 N. M. 441, 292 P. 2d 121 (1956); *LaRue v. Johnson*, 47 N. M. 260, 141 P. 2d 321 (1943); *Feldhut v. Latham*, 60 N. M. 87, 287 P. 2d 615 (1955). It was, therefore, error for Judge Stowers to award partial attorney's fees to Leo C. Kelly, attorney for the plaintiff, rather than to the plaintiff. The error was brought to the attention of the court within thirty days from the date of entry of the judgment by way of a motion to amend the order awarding such fees. A hearing was held before Judge Thomas Mescall, the defendant, by his attorney Mr. Klecan, objected to any such amendment, and Judge Mescall denied the motion.

The remedy is for this court to amend the judgement on remand and a new judgement be entered. *Feldhut v. Latham*, *supra*; *LaRue v. Johnson*, *supra*.

THE REMAINING ISSUES RAISED ON APPEAL ARE NOT APPEALABLE AT THIS TIME

The only grounds for appeal are entry of (a) any final judgement or decision; (b) any interlocutory order or decision which practically disposes of the merits; (c) any final order after entry of judgement which affects substantial rights; or (d) judgements in any proceeding for civil contempt. Sec. 39-3-2 N. M. S. A. 1978 Comp.; N. M. R. Civ. App. 3(a) (1), (2), (3), (4).

A plain reading of the order appealed from (RP 78) shows that Judge Stowers did not hold the defendant in contempt. Plaintiff admits that to do so would be improper, but the simple fact is that he did not do so. Even if he had done so, the order would not be appealable on that ground because no sentence was imposed for the imagined finding of contempt. The rationale behind the allowance of appeals from judgements in any proceeding for civil contempt is that a judgement in civil contempt rendered during the course of a trial does not necessarily, or at all, have any bearing on the merits of the action out of which it grows. *Zellers et al. v. Huff et al.*, 57 N. M. 609, 261 P. 2d 643 (1953). Nevertheless, *Zellers* held, "In criminal cases, as well as civil, the judgement is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined. . . . A sentence must be *imposed* to complete the steps of the prosecution. Until sentence is imposed there is no finality of the judgement. The sentence is the judgement."

More recently, this court in the case of *Henderson v. Henderson*, 93 N. M. 405, 600 P. 2d 1195 (1979), reaf-

firmed the principles laid down in *Zellers*, supra, when it held that "The contempt finding, of itself, is not subject to appeal."

In both *Zellers*, supra, and *Henderson*, supra, the orders appealed from made specific findings that the parties were found in contempt. The order in this case makes no such finding.

Whether (1) The judgement otherwise (other than contempt) violated Rule 35 or violated defendant's constitutional rights, (2) There was error in the Court's findings and conclusions in an order to submit to HLA Testing September 23, 1982, (3) There was error in the Court's finding given in an order on November 24, 1982, or (4) there was error in the trial court's use of Rule 35 threatening a default judgement is not of consequence because none of those matters are ripe for appellate review.

In timeless language, Justice Waters of The Supreme Court of the Territory of New Mexico stated the issue which is before the Court in this case: "But one question presents itself in the consideration of this motion, and that is, was said order a final decision, judgement or decree from which an appeal could be taken?" *Huntington v. Moore*, 1 N. M. 489.

This court, in *Floyd v. Towndrow*, 48 N. M. 444, 152 P. 2d 391 (1944) cited with approval the case of *Attorney General of Utah v. Pomeroy*, 93 Utah 426, 73 P. 2d 1277, quoting from Freeman on Judgements, Sec. 34, in defining a final judgement as follows:

"The general rule recognized by the courts of the United States and by the courts of most, if not all, of the states, is that no judgement or decree will be re-

garded as final, within the meaning of the statutes in reference to appeals, unless all the issues of law and fact necessary to be determined were determined, and the case completely disposed of, so far as the court had the power to dispose of it."

The appeal being pursued here is clearly not within that definition. This is an appeal from a discovery order of the district court. Orders entered on procedural motions that do not practically dispose of the case on the merits are not appealable. *Griego v. Grieco*, 90 N.M. 174, 561 P. 2d 36 (1977).

The policy behind statutes, rules and decisions permitting appeals only from final judgements or orders substantially disposing of the merits of the action is that litigation shall not proceed piecemeal, and there can be but one final judgement in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy. *Otto-Johnson Merc. Co. v. Garcia*, 24 N.M. 356, 174 P. 422, *Floyd v. Towndrow*, supra. Once again, a plain reading of the order here on appeal will reveal that it clearly does not dispose of the merits of the case, but is only a discovery order.

The only remaining point to be addressed relates to the question of whether or not the district court has jurisdiction over the parties and subject matter. This court has decided on two occasions by way of extraordinary writs that the district court does have jurisdiction over the parties and the subject matter. (Supreme Court No. 12845, 1979; Supreme Court No. 13813, 1981). The Supreme Court of the United States has determined that the Supreme Court of New Mexico was correct in that deter-

mination, at least by implication, in that Dr. Rock's appeal to that court was dismissed on motion of the appellee.

The question is not whether or not lack of jurisdiction can be raised at any time, but how many times it can be raised. We think the question of jurisdiction has been decided in this case and that no further appeals should lie on that ground.

CONCLUSION

For the reasons stated, it is clear that the order entered was a mere procedural order not practically disposing of the merits of the case and not holding the appellant in contempt of court; such being the case, the order is not ripe for appellate review. The question of lack of jurisdiction has been finally determined and is no ground for appeal any longer. The district court did err in awarding attorney's fees directly to the appellee's attorney. The appeal should be dismissed and the case remanded to the district court with instructions to reform the judgement in favor of the plaintiff rather than Leo C. Kelly, her attorney.

Respectfully submitted,

LILL & KELLY, P.A.

By LEO C. KELLY

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App. 36

No. 14,704

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Thursday, August 25, 1983

ESTHER ANTONIO,

Plaintiff-Appellee,

vs.

RICHARD ROCK,

Defendant-Appellant.

(Filed August 26, 1983)

This matter coming on for consideration by the Court upon Motion of Appellee to dismiss, and the Court having considered said motion and having heard oral argument and now being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion to dismiss is hereby granted on all issues except POINT II regarding the award of attorney fees to counsel rather than Plaintiff;

As to POINT II, based upon confession of error by counsel for Plaintiff Antonio, the Judgment of the District Court awarding attorney fees is hereby summarily reversed, and the matter is hereby remanded to the District Court with directions to set aside the Order, or amend the same, and order payment to the plaintiff individually.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

App. 37

NO. 14,704

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

ESTHER ANTONIO,

Plaintiff-Appellee,

vs.

RICHARD ROCK,

Defendant-Appellant.

MOTION FOR REHEARING

COMES NOW ~~the~~ Defendant-Appellant, Richard Rock and moves the Court for a rehearing re the Order of the Supreme Court of August 25, 1983 whereby it was ordered that the Motion to Dismiss was granted, except Point II of Appellants appeal.

As grounds for rehearing Appellant asserts that the Order of the Supreme Court of August 25, 1983 assumes that the appeal was properly taken from the Order of the District Court of Bernalillo County. Therefore, Appellant's contention is that the Constitution of the State of New Mexico and the 14th Amendment to the U. S. Constitution guarantees to the Appellant one due process appeal as a matter of absolute right.

That apparently in paragraph 3 of the Court's Order, this Court has made a determination of a legal point raised under Point II of Appellant's Brief in Chief. That point raised the significant legal question of whether in a paternity action, under Section 40-5-1 et seq. N. M. S. A., 1978, attorneys fees can be awarded until there is a judicial determination of paternity.

The order of this Court states that the District Court is directed to order payment to the Plaintiff individually, and no limitation is placed upon the contingency required by Section 40-5-1, as is stated in Point II, Page 13 and 14 of the Brief in Chief. This issue was raised in an appeal which was a valid appeal. No precedent exists in New Mexico under 40-5-1 or any other law here or elsewhere which permits the award of attorney's fees prior to the determination of the action which must be successfully completed with an award for the Plaintiff prior to any award for attorneys fees.

That an award prior to the occurrence of the contingency on which the award would be based, will be in violation of due process in violation of Article II, Section 18, New Mexico Constitution and the 14th Amendment of the U. S. Constitution. See Appellants Brief, Page 13 and 14 where the issues are raised. That certainly the issue of whether this can be done is worthy of treatment and the Order of August 25, 1983 decides this adversely without discussion or authority being cited.

That under Article VI, Section 2, of the New Mexico Constitution, Richard Rock's appeal was a constitutionally authorized appeal to this court. That the order ruling against the Appellant on the question of his contention that a paternity award must precede an award of attorneys fees, denies the Appellant the type of appeal guaranteed to him under Article II, Section 18 and Article VI, Section 2, and the 14th Amendment of the U. S. Constitution. That Appellant contends that this Court has denied him one of his attributes of citizenship and there is no reason as to why he can be deprived of his constitutional

rights without even an explanation. That one of the rights of citizenship, whether allowed or not, is to be informed as to why he is made an exception under the government of the State of New Mexico. No other person has even been ordered to pay attorneys fees which necessarily depend upon a further event that has not yet occurred. Therefore, he is discriminated against in violation of Article II, Section 18 and the 14th Amendment to the U. S. Constitution and the same discrimination is in violation of 42 U. S. C. 1983.

Since the action of the Supreme Court, which forces him to pay \$5,000 attorneys fees, is under color of law, that it appears as a singling out of him to deprive him of his rights without any explanation or supporting authority. That the power of the Supreme Court of the State of New Mexico to decide individual rights, even constitutional rights, by mandates, without explanation, was not granted by the recent legislative act whereby opinion writing on many cases formerly appealable to the Supreme Court of New Mexico was transferred to the Court of Appeals. No provision could be made which would adopt a mandate without explanation as a way appealable issues are decided.

Appellants constitutional rights can, of course, be taken away as a matter of Supreme judicial authority, but whether that is consistent with the Constitution is another issue. No one can dispute the power of this Court to make decisions on appeals which the constitution guarantees to each of its citizens, but constitutionally speaking, each individual's constitutional rights exist under Article VI, Section 2 and Article II, Section 18 and the 14th Amendment to the U. S. Const. The Appellant, Rich-

ard Rock, is constitutionally entitled to an explanation of why he can be made to finance a paternity case before there is an advance decision against and where he has disputed the issues.

That this mandate by the Supreme Court of New Mexico has made substantive law and the fact that it is not promulgated or explained only proves another point of the unconstitutionality which requires promulgation or publication of decisions. Otherwise, this particular Appellant, a citizen of the State of New Mexico, is made an exception and discriminated against.

No one denies the right and willingness of the Supreme Court to enforce its own decrees as stated in the recent case of *Weaver v. Weaver*, No. 14633, filed August 10, 1983, Opinion rendered August 27, 1983 in Bar Bulletin Vol. 22 (No. 34), a case which could be cited below to take away from the trial judge any authority to do otherwise on this unprecedented order that requires the payment of attorneys fees *now*, for an event which *may never* occur.

That the decision promotes persecution of alleged fathers, since they would be forced to pay attorneys fees in advance of a decision and is against public policy and promotes barrety. That a citizen's constitutional rights include the right to assert that it is beyond the judicial function of the Supreme Court under Article VI, Section 2 to decide a case at the trial level. Therefore, awarding attorneys fees before the issues of this case had been decided, involves usurpation of a judicial function belonging to the District Court.

This Constitutional right to one "due process" appeal places limitations upon the judiciary but these limi-

tations must be self-imposed. Therefore, individual citizens are necessarily dependent upon self-imposed limitations and are helpless against constitutional encroachment. This becomes a matter of judicial viewpoint as to the value to be accorded to constitutional rights of individual citizens. The same section of the Constitution of the State of New Mexico, which grants to the Supreme Court the right to have any appellant jurisdiction, also contains the limitations upon the exercise of that appellant jurisdiction.

Of necessity Article II, Section 18 bars any exercise of appellant jurisdiction which would make an exception of any person or his case. This Court, in its Order of August 25, 1983, admits that appeal as to attorneys fees is a true appeal and necessarily protected by Article VI, Section 2. That the fact that the lower court is directed to do something to it, then what it did before can only mean that the Supreme Court of New Mexico is solely the author of attorneys fees payable to a litigant under 40-5-1, et seq. supra, before a trial.

That Appellant further urges that the existence of a valid appeal allowed him to bring up the issue of jurisdiction, which can be raised at any time. The same was a valid appealable point and if the constitutional right to a due process appeal is recognized, then the appellants would have the right to have this matter determined with an explanation and supporting authorities.

As has been pointed out, Appellants Brief in Chief, Federal Regulation, C. F. R., issued by the Department of the Interior and Navajo Code and authority from McKinley County in *Natewa v. Natewa*, 84 NM 69, 499 P2d 691, all expressly state that jurisdiction is in the tribal

court. If those rules, regulations and case are to be overcome, then the Bench and Bar of the State of New Mexico and the Indian tribes should be informed as to how legally this conclusion is raised. The presence of an unstated ruling on a petition for prohibition has never been a bar, therefore, the matter is properly presented in an appeal; otherwise, the existing law as stated above in the Navajo Code, New Mexico Supreme Court decision and the Code of Federal Regulations by the Department of Interior in 25 C. F. R., Section 11.30 on jurisdiction, would be applied in all other cases, resulting in this Appellant being an exception and discriminated against.

That this Court has practically stated that jurisdiction can never be conferred if it does not exist, and the right of citizens in a proper case to be told what the reasons are for jurisdiction to exist where it has not apparently been recognized as existing, is but an attribute of the absolute right to a "due process" appeal. Jurisdiction is an important issue and if this Court believes that it wants to override the Bureau of Interior regulation, then the right to a due process appeal is only the reverse of the coin, which requires laws to be promulgated or published.

For the foregoing reasons Appellant urges reconsideration. If the issues are to be decided adversely to his position, then Appellant urges that there is a constitutional right to a published opinion which would equate all other individuals with him.

POINT II OF APPELLANT'S MOTION

Appellant raises an additional point which is fundamentally a constitutional point. Raising the issue as we

have of limitations upon judicial authority, specially in the highest court of the State is not always popular. Appellant is confronted by the Order of August 25, 1983 with a complete lack of explanation. This posits the question as to whether or not a Supreme Court can do whatever it wants to do. A clerk in the U. S. Supreme Court would say that the Supreme Court of the United States can do whatever it wants. Tradition is the only guide that an appellant has and an omission by this court to write an opinion or to sign it, raises further constitutional questions in that traditionally those judges who participated and signed an opinion were identified. This Order of August 25, 1983 is unsigned and does not designate the authors. Granted, no litigant or attorney in New Mexico can tell the Supreme Court of New Mexico what they should or should not do, but the Supreme Court of New Mexico is not the final authority on issues where a federal constitutional infringement is determined. There are certainly vital issues in this case. The appellant has been vocally blamed at the hearing and responsibility is laid upon him for the case still being untried. An examination of the transcript in this case will show that this is not true in that in the Summer of 1982 the Plaintiff embarked on a procedure to secure HLA blood testing. It was the Plaintiff who did this.

From that unprecedented order which initiated in the Supreme Court of New Mexico when Chief Justice Easley was the presiding member of the panel, a series of constitutional issues arose. The trial judge, Harry Stowers was overruled by the panel described above. He then entered orders which were contained within the appeal. At the time of the oral argument on the motion

to dismiss, it was recognized by the Court that there could be an issue as to whether there was not an improper use of the contempt power of the lower court when the same was expressly provided by the rule dealing with sanctions as they applied to a physical examination. These are important issues dealing with individual rights which the judiciary is bound to respect. The order of August 25, 1983 does not discuss it and the way in which the \$5,000 attorney fees award was handled by the court below in the order that was appealed, plus the fact that no statutory authority exists for the attorneys fees prior to a paternity determination, certainly indicates an alarming situation to the citizenry of this state.

If this Court is going to do it, does it not owe an explanation on legal and constitutional grounds to the people of New Mexico?

There is another aspect of denial of due process appeal as it affects a refusal by the Supreme Court of the United States. We submit that a failure to give an appellant something to go on in bringing the issue to the Supreme Court of the United States is itself a violation of the 14th Amendment and is a violation of the absolute right to a due process appeal. There is no doubt about constitutional issues being unresolved. There is no doubt about the fact that the litigant has on paper a constitutional right to raise the issue and ask the Supreme Court of the United States to do something about it, but it is very difficult when this court does not engage in opinion writing. It is useless for appellants to argue the question with the Court and amounts to an assertion that the people are governed by mandates. This would be the end of constitutional government. If there is no record, not

even a signature, the only appealable point is that there is no record and no signature which is what we believe a due process appeal requires.

We, therefore, submit that if due process still exists, that an opinion signed by the members of the Court who participated is a requisite of due process and equal protection.

There is an additional point which this Order of August 25, 1983 is "by the Court". Constitutionally, Supreme Court Justice, Harry Stowers, could not participate. The fact that the order says that the Court heard oral argument does not mean that the three judges who heard the oral argument were the sole parties to the decision, an experience shows. Many times this court has had a judge on the case who was not one of the three on the oral argument panel. This court would decide an issue on appeal even though it was on a Motion to Dismiss, as several argued before. In addition, Chief Judge Payne, at the time this case came up on a Petition for a Writ, excused himself because he personally knew Richard Rock. We contend that the citizens have a right to know what goes on and certainly it is unconstitutional for the whole Court of New Mexico to have decided this case. A failure to designate and to inform a citizen of the members who decided the case seems to promulgate an idea that the citizens have really very few rights. Precedents are toppling, but there are still some voices that say secrecy is not a good in a democratic society. Free access to the courts is a constitutional right carrying with it the right of information and an elimination of secrecy behind governmental functions that are settling disputes between individuals. This is the issue that is involved.

Deprivation of individual rights protected by the Constitution can have no greater vehicle than secrecy. Elimination of opinion writing is a constitutional violation of individual rights as to the government, we submit.

All we can do is to request, even say that the precipitous slide taken on constitutional protection for individuals by the judiciary be considered and halted. It has reached its climax in the elimination of reasons expressed in an Opinion signed by those whose signatures indicate their responsibility. Such extremes have been reached, and is indicative of a conscious adoption of judicial procedures which does not recognize "due process". It is a complete break with the past when opinion writing goes.

Constitutional government for citizens has been discarded, there remains constitutional government in the sense of a set-up for government like our three branches of government and their respective duties and obligations, but true constitutional government which provides for rights owing to individual citizens can be and is being eliminated. All that remains is the government who is authorized to do whatever it wants to do to the citizens whose human rights are thereby placed in jeopardy because constitutional protection for individual's rights is ignored. This is what has happened right before our eyes in this case and we have a clear anatomy of exaltation of judicial government powers and corresponding deprivation of individual citizen Bill of Rights. Specifically this has been done by, (1) The Supreme Court of New Mexico takes a case on appeal and decides it, which is its constitutional right and obligation but (2) refusing to write its reasons

by refusing to give or write an Opinion. The refusal is a deprivation of the individual's Constitutional right because he has a right to know what the law is. The only law is that the Supreme Court said so. Citizens are rational persons and have a right to be governed by rational decisions. A mandate is not a reason. This depends solely on the power of the government. There has to be some scapegoat like the "case is old" which is, of course, another form of governmental control not express in terms of reason. It is now permissible for the Supreme Court to decide their Opinions are not necessary? That citizens have no right to be told the reasons why rights and duties are adjusted between citizens? Silence in this situation as appellant contends, is unconstitutional. It is as if no one wants to assume the responsibility for the undiscussed, unsupported Opinion. No one has ever attempted to discuss how in a government of laws a trial judge can fine a litigant \$1,000.00 per day as a means of getting him to submit his body to a blood test, and then to assess \$5,000.00 attorneys fees payable at once. It sure appears like the exaltation of government power over individuals and a complete blockage of any right to complaint or appeal to the Supreme Court of the United States because no reason is given. If a jurisdiction means a District Judge can order any citizen to submit to HLA testing because a person charges him with being the father, then why is there any restriction to put it on the line and accept responsibility for it now or at any future decision?

Of illustrative significance is the contents of Article V, Section 2, which contains within itself the grants of Supreme Court jurisdiction and a limitation upon its use by giving to all citizens an absolute right of one appeal. This right cannot be rejected by indirect means. The Su-

preme Court of New Mexico makes law everywhere it renders a decision. A Mandate is not a law. It is an enforcement of a law, and law is defined as a mandate of reason which is promulgated. A failure to give a reasoned explanation deprives it of its true intrinsic value as a law which is entitled to respect and obedience. How can anyone figure out rationally that attorneys fees can be collected in advance of a determination of the issues upon which attorneys fees attorneys depend for their own existence? The Supreme Court has the right to use force to enforce its legitimate decrees and people yielded because they are afraid of the consequences, just as the defendant yielded to the threat of fines and default and imposition of attorneys fees. Is there no right for individuals, even a right of protest?

Respectfully Submitted,

KLECAN & SANTILLANES, P. A.

By: /s/ Eugene E. Klecan

520 Sandia Savings Building

4th & Gold S.W.

Albuquerque, NM 87102

(505) 243-7731

CERTIFY THAT a copy of the foregoing pleading was mailed to Leo Kelly, Esq. this 2 day of September, 1983.

/s/ E. E. Klecan

App. 49

NO. 14,704

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Wednesday, September 7, 1983

ESTHER ANTONIO,

Plaintiff-Appellee,

vs.

RICHARD ROCK,

Defendant-Appellant.

This matter coming on for consideration by the Court upon Motion of Appellant for Rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellant for Rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

MANDATE NO. 14,704

(Received September 29, 1983)

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Bernalillo, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered DR 79-01505 on your Civil Docket, wherein Esther Antonio was Plaintiff and Richard Rock was Defendant, by your consideration in that behalf judgment was entered against said Defendant; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by Defendant by appeal, whereupon such proceedings were had that on August 25, 1983, an Order was entered by said Supreme Court dismissing the appeal except as to Point II regarding the award of attorney fees and remanding said cause to you.

NOW, THEREFORE, this cause is hereby remanded to you with direction to set aside the Order or to amend ordering payment to Plaintiff individually.

WITNESS, The Hon. H. Vern Payne, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 22nd day of September, 1983.

(SEAL)

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

App. 51

NO. 14,704

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Wednesday, September 14, 1983

Bernalillo County

ESTHER ANTONIO,

Plaintiff-Appellee,

vs.

RICHARD ROCK,

Defendant-Appellant.

(Received September 16, 1983)

This matter coming on for consideration by the Court upon Motion of Appellant for Stay of Proceedings, and the Court having considered said motion and being sufficiently advised;

NOW THEREFORE, IT IS ORDERED that Motion for stay of proceedings is hereby denied, it appearing to the Court that no pleadings have been filed in this Court showing that petition for certiorari or other review of the Supreme Court of the United States has been filed, and, upon the filing of such petition, the Petitioner may request the Supreme Court of the United States to stay the proceedings.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

ESTHER ANTONIO, *Plaintiff*,

VS.

RICHARD ROCK, *Defendant*.

FIRST AMENDED COMPLAINT FOR PATERNITY

Plaintiff, ESTHER ANTONIO, for cause of action against Defendant, RICHARD ROCK, states:

1. That Plaintiff is a resident of the City of Albuquerque, Bernalillo County, State of New Mexico.

2. That Defendant is a resident of the City of Albuquerque, Bernalillo County, State of New Mexico.

3. Defendant, RICHARD ROCK, is the father of a certain child, namely, RACHAEL ANTONIO, born out of wedlock to the Plaintiff, ESTHER ANTONIO, on or about the 11th day of May, 1975, at Presbyterian Hospital, Albuquerque, New Mexico.

4. That by reason of §§ 40-5-1 et seq., N.M.S.A., 1978 Comp., Defendant, RICHARD ROCK, is obligated to contribute to the support of said child.

5. That the Defendant has acknowledged the paternity of the minor child at all times since her birth by contributing to the costs of the Plaintiff's pregnancy and confinement and by contributing to the costs of supporting the child since her birth.

6. That the contributions made by the Defendant toward the costs of supporting the child from May 11, 1975, until the present do not comprise one-half of the total costs of supporting said child, as a result of which Plaintiff is entitled to judgment against the Defendant is an

amount to be determined by the Court based upon the evidence to be presented.

7. That the Plaintiff is unable to afford her attorney fees and costs for the bringing of this action.

WHEREFORE, Plaintiff prays for judgment against the Defendant declaring that the Defendant is the father of the child born to the Plaintiff, for judgment in the amount of one-half ($\frac{1}{2}$) the expenses of supporting said child until she reaches the age of majority, for reasonable attorney fees, for her costs incurred herein, and for such other and further relief as to the Court seems proper.

ANSWER TO FIRST AMENDED COMPLAINT

COMES Now the defendant, Richard Rock, and answers the plaintiff's First Amended Complaint as follows:

1. That the defendant lacks knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 1 of the First Amended Complaint and therefore denies same.

2. The allegations in paragraph 2 of the First Amended Complaint are admitted.

3. The allegations contained in paragraph 3 of the First Amended Complaint are denied.

4. That the allegations contained in paragraph 4 of the First Amended Complaint are denied.

5. That the allegations contained in paragraph 5 of the First Amended Complaint are denied.

6. That the allegations contained in paragraph 6 of the First Amended Complaint are denied.

7. That defendant lacks sufficient knowledge to form a belief as to the truth or falsity of the allegations in paragraph 7 of the First Amended Complaint and therefore denies same.

AFFIRMATIVE DEFENSES

1. The Court lacks jurisdiction over the parties herein.

2. The Court lacks jurisdiction over the subject matter herein.

3. Plaintiff's action is barred by the statute of limitations.

4. The First Amended Complaint fails to state a claim upon which relief can be granted.

NMSA (1978)

40-5-1. *Child's right to support.*

The father and mother of a child born out of wedlock are jointly and severally liable for the support of the child until he reaches the age of majority.

40-5-4. *Third parties' right to sue.*

The obligation of the father or mother creates also a cause of action on behalf of their legal representatives or on behalf of third parties furnishing support or defray-

ing the expenses thereof where parentage has been judicially established, or where parentage has been acknowledged in writing or by the part performance of the parental obligations.

40-5-5. *Discharge of obligations; adoption of child.*

The support obligation of a parent is discharged by complying with a judicial decree for support or with the terms of a judicially approved settlement. The adoption of the child into another family discharges the obligation for the period subsequent to the adoption.

40-5-7. *Proceedings to compel support; who may bring.*

The proceeding to compel support and establish parentage of the child may be brought by a parent or if the child is or is likely to be a public charge, by the state of New Mexico. After the death of the complainant parent or in the case of his disability, it may also be brought by the child, acting through his guardian or next friend. If the proceeding is brought by the public authorities, the parents may be made defendants.

40-5-9. *Jurisdiction of proceedings to compel support and parentage; form of complaint; summons; procedure.*

Jurisdiction over proceedings to compel support and establish parentage of the child is vested in the district court of the county in which either parent permanently or temporarily resides, or is found. It is not a bar to the jurisdiction of the court that the complainant parent and child reside in another state. The complaint shall be filed in the district court having jurisdiction and shall charge

the person named as defendant with being the father or mother of the child and demand that such person be compelled to support the same, and it may contain such facts relating to the property of the defendant as are within the knowledge of the complainant.

Summons shall be issued and served as in other civil actions, and the cause shall be tried by jury, unless jury trial be waived by the parties. The procedure shall be the same as in other civil actions.

40-5-11. [*Testimony by father and mother permitted.*]

Both the mother and the alleged father shall be competent, but not compellable, to give evidence and if neither gives evidence, he or she shall be subject to cross-examination.

40-5-15. *Judgment of parentage and support.*

If the finding or verdict be against the defendant, the court shall give judgment against him declaring parentage and for support of the child. The judgment shall be for annual amounts, equal or varying, having regard for his obligation under Section 40-5-2 NMSA 1978 as the court directs, until the child reaches the age of eighteen years or sooner dies. The payments may be required to be made at such period or intervals as the court directs. In addition to the judgment for support, there may be a judgment for reasonable attorney fees.

40-5-19. [*Continuing jurisdiction of court.*]

The court has continuing jurisdiction over proceedings brought to compel support and to increase or decrease

the amount thereof, until the judgment of the court has been completely satisfied, and also has continuing jurisdiction to determine custody in accordance with the interests of the child.

40-5-20. *Failure to support child; penalty.*

The failure of either spouse, without lawful excuse to support the child where parentage has been judicially established, or has been acknowledged in writing or by the part performance of parental obligations, is punishable by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment in the penitentiary for not exceeding two years, or by both such fine and imprisonment. Proof of the omission by either parent to furnish necessary food, clothing, shelter, medical attention or other remedial care for his child is prima facie evidence of failure to support the child without lawful excuse.

40-5-21. *Failure to comply with judgment for support of child; penalty.*

The failure, without lawful excuse, of a parent to comply with and carry out a judgment for the support of the child, whether the child be a resident in the jurisdiction where the judgment was rendered or not, is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the penitentiary for not exceeding two years, or by both such fine and imprisonment, at the discretion of the court.

40-5-22. *Criminal prosecution; civil proceedings not affected.*

A criminal prosecution brought in accordance with the provisions of Section 40-5-20 NMSA 1978 or Section 40-5-21 NMSA 1978, shall not be a bar to, or be barred by civil proceedings to compel support.

40-5-23. *Limitation of actions.*

Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two years from the birth of the child unless paternity has been judicially established or has been acknowledged by the father in writing or by the furnishing of support, except that there shall be no time limitation on proceedings initiated by the state.

25 U. S. C. § 1322 et seq is entitled, "Assumption by state of civil jurisdiction." This can only be done with the consent of the State and the Indian Nation. Neither the State of New Mexico nor the Navajo Nation have consented.

ESTHER RUTH ANTONIO

was called as a witness by the Defendant, and having been first duly sworn, was examined and testified as follows:

EXAMINATION

By MR. KLECAN:

Q. Would you state your name.

A. Esther Ruth Antonio.

Q. And you know your date of birth?

A. April 3, 1938.

Q. Where?

A. Rehoboth, New Mexico.

Q. Is that on the Navajo Reservation?

A. Yes.

Q. Were you born in the hospital?

A. At the Mission Rehoboth Hospital.

Q. Are either of them still alive?

A. My father is dead.

Q. When did he die?

A. Two years ago.

Q. Where?

A. On the reservation.

Q. Do you know his census number, offhand?

A. No.

Q. Was he a Navajo Indian?

A. He's a full-blooded Navajo.

Q. Is your mother a full-blooded Navajo?

A. Yes.

Q. Were they married in any kind of ceremony?

A. Indian ceremonial.

Q. Indian ceremonial?

A. It's not recognized—I think it's common law in the white man's law.

Q. Are you telling me that you think that the white man's legal name for it would be a common law marriage?

A. Yes, that's what they call it.

Q. Were you given a census number?

A. Yes, but I don't know.

Q. And your mother is still alive?

A. My mother is still alive.

Q. Is she married to anybody now?

A. No.

Q. She's not living with any man?

A. No.

Q. Do you know when she and Largo split the blanket?

A. About two years after.

Q. Then there was an intervening marriage in there?

A. I don't know that one. There's a middle one. I don't know about that. That's the last one.

Q. If you live together, that's marriage, Navajo style?

A. That's marriage.

Q. What name do they give whereby they might be living in the hogan? Is that where you live, in a hogan?

A. We have a hogan for my mother. We have a house.

Q. You have a house, too?

A. Yes.

Q. Where is the house?

A. Right next to the hogan?

Q. And where is that located?

A. Coolidge, New Mexico.

Q. Is this your family home, so to speak?

A. Yes.

Q. Coolidge, New Mexico? And who lives there now?

A. My mother, the whole family.

Q. Is that in Arizona or New Mexico?

A. New Mexico.

Q. Where is that located in relationship to Crownpoint?

A. It covers the Crownpoint area and all the way down to Zuni, I think.

Q. It's the Eastern part of the reservation?

A. Yes.

Q. Crownpoint is right on there?

A. Yes, that's where the subagency is.

Q. Now, your whole family lives there? That's near Crownpoint, I understand?

A. Yes.

Q. But it is on the reservation?

A. Yes.

Q. Let me go back over this again, what you call something similar to divorce. When that takes place, the father leaves?

A. Yes.

Q. And then the children are not supported by him?

A. No, the mother does.

Q. The mother has the duty to take care of the children?

A. Well, she has all the wealth from the previous marriage. She has the horses, the cows, whatever, included.

Q. Regardless of whether she divorces, takes up with another man or whether he's the one that takes up with another woman?

A. Yes.

Q. It doesn't make any difference, the mother gets all the property in the divorce?

A. Yes.

Q. And the father, according to Navajo custom, doesn't have any responsibility to furnish anything for the children?

A. No.

Q. That's the way it happened in your case?

A. Yes.

Q. How many sisters do you have, full sisters?

A. Two.

Q. Now, I think you told us that in June of '74 you quit at Crownpoint and you were living up there. Did you let your house go right away up there, or did you continue to hold it for awhile in '74?

A. You had to move out of the government houses when you quit a government job.

Q. I am asking how quick.

A. As soon as you quit.

Q. You did get out that day, or thereabouts. Where did you go then?

A. To my mother's spare home.

Q. Was that in Coolidge?

A. Yes.

Q. Is this the hogan or the house?

A. It's the extra home they have at a hogan.

Referring to family Indian life on the Navajo Reservation, she said:

Q. I am talking about the birth certificate. Have you ever seen it?

A. No, not on the birth certificate, this is on the Indian census.

Q. Where is that located?

A. Crownpoint.

Q. So you did register her in Crownpoint and got a census number?

A. Yes.

Q. What is her census number?

A. I don't have it. I couldn't tell you.

Q. But she does have one.

A. She does have one, but I couldn't tell you.

Q. What is your census number?

A. I couldn't tell you, either.

Q. Does Rachel have a census number?

A. Yes.

Q. That's a Navajo census number?

A. Yes.

Q. Are you registered to vote anywhere?

A. On the reservation.

Q. At Window Rock, or Crownpoint?

A. Crownpoint.

Q. Would your records, like census number, and also Esther's be at Crownpoint?

A. Should be.

Q. It doesn't make any difference, the property in the divorce?

A. Yes.

TREATY WITH THE NAVAJO INDIANS

June 1, 1868

Treaty between the United States of America and the Navajo Tribe of Indians; Concluded June 1, 1868; Ratification advised July 25, 1868; Proclaimed August 12, 1868.

ANDREW JOHNSON

President of the United States of America, to all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:—

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:—

Article I. From this day forward all war between the parties to this agreement shall forever cease. The gov-

ernment of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

Article XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart from the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart from the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief. his x mark.

ARMIJO.
DELGADO.
MANUELITO.
LARGO.

his x mark.

his x mark.

his x mark.

No. 14,116

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel,
DEPARTMENT OF HUMAN SERVICES

Petitioner-Appellant,

v.

JIMMY ANDREW JOJOLA,

Respondent-Appellee

Motion of Pueblo of Isletta to File Amicus Curiae Brief
(Filed July 21, 1982)

The Pueblo of Isletta, by and through their attorney, Michael Taylor, moves this court to grant them permission to file an Amicus Curiae brief in this matter. The reasons for the motion are more fully set out in the pages of this brief but they include the following:

1. The Pueblo of Isletta wishes to protect its ancient and time honored traditional jurisdiction over activities of its members when they occur within the boundaries of its Reservation from intrusions by the Attorney General of the State of New Mexico.

2. The Pueblo of Isletta wishes to protect the jurisdiction of its modern tribal court system over those matters set out in the Isletta code and in the laws of the tribe—especially as regards the domestic relations and child care responsibilities of members residing on the Reservation from intrusions by the Attorney General of New Mexico.
3. The brief of the Attorney General of New Mexico in this case deliberately misconstrues the facts regarding concern of the Pueblo and is governing body for the welfare of Pueblo families.

For these reasons the Pueblo requests an opportunity to explain its position in this matter by way of an *amicus curiae* brief.

Respectfully submitted,

/s/ Michael Taylor
Reservation Attorney
Colville Confederated Tribes
P. O. Box 150
Nespelem, WA 99155

(509) 634-4711

App. 69

No. 14,116

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel,
DEPARTMENT OF HUMAN SERVICES

Petitioner-Appellant,

vs.

JIMMY ANDREW JOJOLA,

Respondent-Appellee.

BRIEF OF AMICUS
CURIAE PUEBLO OF ISLETTA

(Filed July 21, 1982)

Appeal from the District Court
of
Bernallillo County, State of New Mexico

PHILIP R. ASHBY
DISTRICT JUDGE

By: Michael Taylor
Reservation Attorney
Colville Confederated Tribes
P. O. Box 150
Nespelem, WA 99155

(509) 634-4711

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(p. 1) INTEREST OF THE PUEBLO OF ISLETTA

The Pueblo of Isletta files this *amicus curiae* brief in order to protect the jurisdiction of its Tribal Court and the exclusivity of its laws and jurisdiction over the domestic relations of its members who, like the defendant here, reside on the Reservation.

RESERVATION INDIAN JURISDICTION DIFFERS FROM SISTER STATE JURISDICTION

The Attorney General has brought many of the authorities together in his brief. He just has a difficult time figuring out what they mean. For example, he knows about and relies upon a number of cases dealing with the issues of Indian jurisdiction but does not recognize that in this case the issue is not the impact of New Mexico laws upon the rights of a citizen from a sister state but the impact of New Mexico laws upon a member of an Indian tribe whose relevant activities all took place on his reservation. The analogies here between sister state and Indian reservation jurisdiction are weak.

Those analogies are weak because the United States Congress and the Supreme Courts of the United States and New Mexico have found that while a state court may assert jurisdiction over a citizen of another state for activities that occurred (p. 2) within the jurisdiction of the citizen's home state, the same is not true of a member of a federally recognized Indian tribe acting within the boundaries of an Indian reservation. *Williams v. Lee*, 358 U.S. 217 (1959), *Chino v. Chino*, 90 N.M. 204, 561 P. 2d 476 (1977), *Joe v. Marcum*, 621 F. 2d 358 (10th Cir. 1980).

The attorney general does not deny the facts that:

- A. Defendant is an enrolled member and resident of the Pueblo of Isletta.
- B. The alleged mother of defendant's alleged child is an enrolled member and resident of the Pueblo of Isletta.
- C. Defendant's alleged child is an enrolled member and resident of the Pueblo of Isletta.
- D. All relevant alleged activities involved in conception of defendant's alleged child occurred on the Pueblo of Isletta.
- E. The Pueblo of Isletta has a Tribal Court and a tribal code which allows for the bringing of actions for paternity.
- F. The Tribal Court of the Pueblo of Isletta is open to a suit by the plaintiff against the defendant.

A brief look at the relevant state and federal law in such matters makes one wonder why the attorney general ever filed this matter in the Courts of the State of New Mexico.

(p. 3) THIS CASE IS INDISTINGUISHABLE FROM
WILLIAMS V. LEE

The claim of State jurisdiction made by the attorney general in this case is based solely on the fact that defendant was served outside the reservation. The fact of where service is made is not determinative of jurisdiction. *State Securities v. Anderson*, 84 N. M. 786, 506 P. 2d 786 (1973), (listing a number of areas in which tribal jurisdiction is exclusive including the domestic relations of members residing on reservation.) For example, if in *Williams v.*

Lee, 358 U. S. 217 (1959) the Indian defendant had been served with state process off the reservation, that fact alone would not have changed the result. In *Williams*, as here, the debt claim against the Indian defendant was transitory. But place of service was never a key factor in *Williams*. The key factors were: (1) lack of general state jurisdiction over the on-reservation activities of tribal members under the applicable federal law, P. L. 83-280; (2) the fact that every activity relevant to the claim took place within the boundaries of the reservation; (3) the fact that defendant was, at all relevant times, a tribal member residing on the reservation; (4) the fact that the tribal government had provided judicial remedies for the *Williams* defendant's alleged conduct which were available to plaintiff and were appropriate, although different from those available in State Court (the infringement test).

(p. 4) This is exactly the situation which exists in this case. Plaintiff would have this Court hold that in a case where the only fact different from *Williams* is off-reservation service on the Indian defendant, the Courts of New Mexico should find that they have jurisdiction. Analysis of plaintiff's argument need go no further.

ON-RESERVATION DOMESTIC RELATIONS OF TRIBAL MEMBERS ARE WITHIN THE EXCLUSIVE JURISDICTION OF THE TRIBE

There is another fact in this case, however, which should make the exclusivity of tribal jurisdiction even more apparent to the attorney general. This case involves claims regarding the domestic relations of tribal Indians living on a federally recognized Indian reservation. Domestic

and family relations of Indians living on the reservation have always been, absent some federal legislation granting jurisdiction to federal or state courts, the *exclusive* province of the tribe. *United States v. Quiver*, 241 U.S. 602 (1916); *Fisher v. District Court*, 96 S. Ct. 943 (1976); Cohen, *Handbook of Federal Indian Law* 1942 ed, reprinted by University of New Mexico Press, p. 137; *Felix S. Cohen's Handbook of Federal Indian Law*, Strickland Editor in Chief; Michie; 1982 ed., pp. 237, 249, 342. Tribes in New Mexico have never been deprived by federal law of this exclusivity of jurisdiction over the on-reservation, (p. 5) family and domestic relations of their members. In fact, Congress has recently seen fit to expand tribal jurisdiction in family matters under some circumstances to off-reservation activities. P.L. 95-608, 92 Stat. 3069, Indian Child Welfare Act, 25 U.S.C. 1901-1952. The attorney general cannot now, on the strength of a few state statutes and service of process off the reservation, avoid the clear impact of this ancient and sacred power of the Pueblo tribes to control domestic behavior within their own reservations. *Chino v. Chino*, 90 N. M. 204, 561 P. 2d 476 (1977).

Adoption of Doe, 89 N. M. 606, 555 P. 2d 906 (1976) is, of course, a case in which the Navajo child was residing outside the reservation during all times relevant to this case. Residence is an important factor in defining the limits of tribal jurisdiction. If, in *Williams v. Lee*, *supra*, the Indian debtor had been residing off the reservation when State service was obtained on him, it is likely that the United States Supreme Court would have allowed the action to proceed in State court. But regarding off reservation activities see: *Joe v. Marcum*, 621 F. 2d 358 (10th

Cir., 1980), and the Indian Child Welfare Act 25 U.S.C. 1901-1952.

(p. 6) **ALLEGED HIPOCRACY OF THE
PUEBLO OF ISLETTA**

The attorney general complains bitterly about his inability to obtain a remedy from the District Court in this matter and charges that the Pueblo is hypocritical because its laws require him to go to the Tribal Court. The answer to this charge, of course, is that the Pueblo has voiced its concern for these kinds of problems and its members by establishing a Tribal Court with powers to grant the attorney general the remedy he seeks if he can prove his case. The problem in this matter appears not to be the hipocracy of the Pueblo, which has carefully guarded its jurisdiction for centuries, but an inability to read and understand the clear points of law that protect and govern tribal jurisdiction.

This court in its enlightened decision *Chino v. Chino*, supra, found that tribal jurisdiction was not to be ignored and subverted simply because it was exercised differently from that of New Mexico. The Pueblo of Isletta asks this Court to reaffirm that principle in this case.

Respectfully submitted

/s/ Michael Taylor
Attorney for Amicus
Curiae Pueblo of Isletta

Box 150
Nespelem, WA 99155

App. 76

No. 14,116

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.,
DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellant,

vs.

JIMMY ANDREW JOJOLA,

Respondent-Appellee.

MOTION TO DISMISS

(Filed June 14, 1983)

The Petitioner-Appellant, the State of New Mexico, ex rel., Department of Human Services, by its attorney, moves the Court for an Order dismissing the above-numbered cause and the appeal to the United States Supreme Court by Respondent-Appellee in the above captioned cause and as grounds states the following:

1. Petitioner-Appellant's Petition for Determination of Paternity in the District Court for the Second Judicial District was dismissed for lack of subject matter jurisdiction.

2. The decision was reversed upon appeal to this Court by Petitioner-Appellant and the cause remanded to the District Court.

3. The Human Services Department will no longer pursue paternity determinations of this type in the District Court of the State of New Mexico.

4. The Human Services Department, pursuant to State and Federal authority and according to law will

assist the custodial parent to determine paternity in the tribal courts.

5. Petitioner-Appellant is, therefore, adopting as policy the argument and position of Respondent-Appellee on the issues before the Court regarding paternity determinations.

6. There are no other issues before the Court in this Cause.

7. On June 13, 1983, Petitioner-Appellant filed a Motion to Dismiss the remanded action in the District Court of the Second Judicial District.

8. Petitioner-Appellant is now assisting the custodial parent, Diane Abeita, to prepare and file an action to determine paternity in the tribal court of Isleta Pueblo.

9. Petitioner-Appellant believes that the appeal to the United States Supreme Court has not yet been docketed. Pursuant to Rule 14.2 of the Rules of the United States Supreme Court this Court may dismiss the appeal upon motion of the Petitioner-Appellant-Appellee and notice to the Respondent-Appellee-Appellant.

Wherefore, Petitioner-Appellant-Appellee moves this Court to dismiss this appeal because no issue remains in dispute.

Respectfully submitted,

Paul Bardacke
Attorney General

/s/ William Walker
Special Assistant Attorney General
Human Services Department
P. O. Box 2348
Santa Fe, New Mexico 87503
(505) 827-4122

(p. 49) **MEMORANDUM DECISIONS**
Cite as 104 S. Ct. (1983)

Jimmy Andrew JOJOLA, appellant, v.
NEW MEXICO, etc. No. 82-2049.

Appeal from the Supreme Court of New Mexico.

Case below, 99 N. M. 500, 660 P. 2d 590.

Oct. 3, 1983. The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

5. The following provision of the Enabling Act for the State of New Mexico is involved in this Appeal. New Mexico statutes 1978 Annotated, Historical Documents, Volume I, Page 106: Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States.

SIXTY-FIRST CONGRESS. SESS. II. CHS. 309, 310. 1910.

CHAP. 310.—An Act To enable the people of New Mexico to form a constitution and state government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the qualified electors of the Territory of New Mexico are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of New Mexico. Said convention shall consist of one hundred delegates, and the governor, chief justice, and secretary of said Territory shall apportion the delegates to be thus selected, as nearly as may be, equitably among the several counties thereof in accordance with the voting population, as shown by the vote cast at the election for Delegate in Congress in said Territory in nineteen hundred and eight; *Provided*, That in event that any new counties shall have been added after said election, the apportionment for delegates shall be made proportionate to the vote cast within the various precincts contained in the area of such new counties so created, and the proportionate number of delegates so apportioned shall be deducted from the original counties out of which such counties shall have been created.

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his

or her mode of religious worship; and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as foresaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from

taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.

Ninth. That the State and its people consent to all and singular the provisions of this Act concerning the lands hereby granted or confirmed to the State, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in this Act provided.

All of which ordinance described in this section shall, by proper reference, be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress.

App. 82

No. 81-1034

IN THE
SUPREME COURT OF THE UNITED STATES

State of New Mexico, ex rel Richard Rock,

Petitioner,

v.

Hon. Harry E. Stowers, Jr.,

Respondent.

Appeal From The Supreme Court of the
State of New Mexico

JURISDICTIONAL STATEMENT

JURISDICTION

Jurisdiction is asserted under 28 U. S. C. § 1257 (1) (2) (3). The case in the Supreme Court of New Mexico was an original proceeding in Prohibition in the highest court of the State of New Mexico, and is a final judgment. *Fisher v. Dist. Ct. of Montana*, 424 U. S. 382, 47 L. Ed. 2d 106, 96 S. Ct. 953 (1976).

The Supreme Court of New Mexico denied relief to the Petitioner on the Petition for Writ of Prohibition on August 19, 1981. The Notice of Appeal was filled in the Supreme Court of the State of New Mexico on September 1, 1981.

9. The following statute of U. S. 25 U. S. C. 1901, et. seq., are involved in this Appeal. Section 1901, subdivision (2) (3) (4) and (5).

§ 1901 *Findings*

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

- (2) that Congress, through statutes, treaties, and the general course of dealing with the Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
- (3) that there is no resources that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
- (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
- (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Also involved in this Petition is definition of Jurisdictional Section 1911:

Child Custody Proceedings

§ 1911 Jurisdiction, intervention; full faith and credit

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal Law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the (p. 6) Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State Court proceeding for the foster care placement of, or termination of parental rights to, any Indian Child, the Indian custodian of the child and the Indian child's tribe shall have the right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts,

records, and judicial extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Under definition of Section 1903, we find the following:

- (3) "Indian" means any person who is a member of an Indian tribe.
- (4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;
- (5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership;
- (9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(p. 7)

- (12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.
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App. 86

No. DR-79-01505

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

ESTHER ANTONIO,

Plaintiff,

vs.

RICHARD ROCK,

Defendant.

REQUEST FOR RECORD PROPER

COMES NOW the Defendant-appellant Richard Rock and requests that the Clerk of the District Court prepare the record as follows for purposes of appeal in the above entitled cause: The Amended Complaint and the Answer to the Amended Complaint. Plaintiff's Motion for an Order concerning HLA and Red Blood Cell Typing and all pleadings subsequent to that Motion. The original Motion was filed on or about May 21, 1982, and all Orders thereafter, including the Order of November 24, 1982.

KLECAN & SANTILLANES, P. A.

By: /s/ Eugene E. Klecan
Attorney for Defendant-appellant
Richard Rock
520 Sandia Savings Building
Albuquerque, New Mexico 87102
(505) 243-7731

I hereby certify that a true
copy of the foregoing was mailed
to Leo Kelly, opposing counsel
of record, this 9th day of
December, 1982.
/s/ E. E. Klecan

No. DR-79-01505

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

ESTHER ANTONIO,

Plaintiff,

vs.

RICHARD ROCK,

Defendant.

REQUEST FOR TRANSCRIPT OF PROCEEDINGS

COMES NOW the Defendant-appellant, Richard Rock, and requests that the Court Reporter prepare the following proceedings for purposes of appeal in the above entitled cause: All hearings evidentiary and otherwise on Plaintiff's original Motion for HLA and Red Blood Cell Typing and all transcribed and evidentiary hearings subsequent thereto. It can also include transcription of any hearings on the Statute of Limitations.

Defendant-appellant will appeal on the following points:

1. It was error to award judgment in favor of Leo Kelly in the sum of \$5,000.00 as partial attorney's fees.
2. It was error to impose a punitive fine upon the Defendant, even as conditional, and was error to impose Court costs in the sum of \$10,000.00, even as conditional.
3. It was error to order HLA red blood cell typing.
4. The Court's findings about failure to appear were error and not supported by the evidence.

5. The Court was without jurisdiction to enter such Orders.

6. It was error to deny Defendant's Motion to Strike and Motion to Quash.

7. The Court erred in its original ruling on HLA and red blood cell typing as the same was without any foundation in the evidence.

8. It was error for the Court to threaten a Default Judgment.

9. It was error to deny Defendant's Motion to File a Counterclaim.

10. It was error to deny Defendant's Motion to Dismiss based on the Statute of Limitations.

KLECAN & SANTILLANES, P.A.

By: /s/ Eugene E. Klecan
Attorney for Defendant-Appellant,
Richard Rock
520 Sandia Savings Building
Albuquerque, New Mexico 87102
(505) 243-7731

I hereby certify that a true
copy of the foregoing was mailed
to Leo Kelly, opposing counsel
of record, this 9th day of December, 1982.
/s/ E. E. Klecan

No. DR 79-01505

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

ESTHER ANTONIO,

Plaintiff,

vs.

RICHARD ROCK,

Defendant.

MOTION TO STRIKE

(Filed November 19, 1982)

COMES NOW the Defendant Richard Rock and moves the Court to strike a setting date and a Request for a Setting, for which a date was given and which we orally transferred on November 18, 1982, to November 22, 1982 at 9:00 a.m. The Request was for a setting for "Defaults/Merits". As grounds for this Motion, Defendant asserts that the Constitution and the Statute require a jury trial; and, in addition, there are no appropriate pleadings by the Plaintiff on which said Request can be made; and, there is pending as an issue to be tried, the Statute of Limitations; and, discovery has not been completed on a number of issues; and, said Request and settings with such short notice are premature without foundation and in violation of Defendant's rights to a full hearing and against the due process rights of the Defendant.

That procedures required by the Rules and "due process" under the Constitution have been disregarded as to a default and a determination of anything on the merits.

That such a Request denies Defendant a due process right to defend himself and denies him his day in court. That Defendant could not in any constitutional sense of the term prepare for a "merits" hearing on such short notice which would also deprive him of his right to a trial by jury.

That months ago the Court ruled that a Jury would decide the issues involved in the Statute of Limitations issue and the Request is in violation of that Order as well as the right to a Jury Trial.

That attached hereto as Exhibit A is an Order of the Supreme Court dated November 12, 1982, which was in continuous effect until November 17, 1982, when it was dissolved. That the foregoing is proof of the prematurity of the Request and setting.

WHEREFORE, Defendant moves that the Request and Setting for November 22, 1982, be voided for the reasons stated above.

KLECAN & SANTILLANES, P.A.

By: /s/ Eugene E. Klecan
Attorney for Defendant
520 Sandia Savings Building
Albuquerque, New Mexico 87102
(505) 243-7731

I hereby certify that a true
copy of the foregoing was mailed
on opposing counsel of record
this 19th day of November, 1982.
/s/ E. E. Klecan

YOU MAY put the phone dial on me Mrs. Rock. But us Indians have ways of findings (sic) out proofs on our enemies through the ceremonies of the mediceman (sic).

Rachael, does exist and this check was a pay off to the illegitimate child. If you don't get your honky husband to contact the attorney of my aunty. The Doctor will pay hard for the pressures he put on my mother and she nearat (sic) the point of a mental broke (sic) down. I lost one mother and I am not about to lose this one.

Last of all he has no right whatever to cower off to Alaska or Hawaii. My mother stays on her native land
THE SOUTHWEST.

The honky Doctor does not belong here, let him move his family or there will be Indians sitting at his office, hospitals, and home. The signs will say honky Doctor support your illegitimate half Indian.

Exhibit 5
(envelope) stamp
Mrs. Mary Ellen Rock
1805 Notre Dame Dr. N. E.
Albuquerque, New Mexico 87131

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

No. DR 79-01505

ESTHER ANTONIO,

Plaintiff,

vs.

RICHARD ROCK,

Defendant.

COUNTER-CLAIM

COMES NOW the Defendant, Richard Rock, through his attorney, and states:

That in February, 1979, there was sent to his home, through the mails, a threatening letter which was an extortion demand. A copy of that letter is attached.

That as a result of this letter, Defendant was subjected to great expense and mental suffering, and the letter, in itself, constituted a liable and was publicized and directed to the wife of the Defendant Rock, a result for which damages were sustained, and the same was a fraudulent act designed to obtain money in the sum of \$50,000 that constituted an act of fraud and duress for which damages were sustained by the counter-claimant.

That the Counter-Defendant, Esther Antonio, was a party responsible for the threats and was herself the party for whom the money demanded by the letter was to be paid.

WHEREFORE Defendant, Richard Rock, prays judgment against the counter-defendant, Esther Antonio, for money damages together with costs, interest and attorney's fees.

KLECAN & SANTILLANES, P.A.

By: Eugene E. Klecan
520 Sandia Savings Building
Albuquerque, New Mexico 87102
(505) 243-7731

I hereby certify that a true copy of the foregoing was mailed to opposing counsel of record this ____ day of September, 1982.

DR-79-01505

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

ESTHER ANTONIO,

Plaintiff,

vs.

RICHARD ROCK,

Defendant.

MOTION TO DISMISS BASED ON
STATUTE OF LIMITATION AND/OR LACHES

(Filed June 14, 1982)

COMES NOW the Defendant and moves the Court to dismiss this case because the Statute of Limitations bars this action.

A. STATUTE OF LIMITATIONS

This Motion is based on:

1. Lovelace Clinic records of Rachal Antonio which show that Esther Antonio, the mother, signed a written document in which a party named Elmer Fike was stated to be the person responsible for the payment of the Lovelace Clinic charges for the pediatric care of Rachal Antonio. That this document was signed on May 27, 1975 and the child was born May 11, 1975.

2. That the Lovelace Clinic pediatric care referred to was furnished by Dr. Donald C. Pinkerton, a Lovelace Clinic pediatrician, and the signed statement by Esther Antonio as to the party responsible for the pediatric services was in response to a question by a nurse or clerical

person in Dr. Pinkerton's office and was signed by Esther Antonio in her own handwriting and was voluntarily made.

3. That the deposition of Harry Antonio, a full brother of Esther Antonio, contains testimony that Elmer Fike was a person known to the Plaintiff, Esther Antonio. That said deposition was taken on June 4, 1982 in Gallup, New Mexico and will be filed as soon as prepared.

4. That a second document in the Lovelace Clinic files for the pediatric care of the child, Rachal Antonio, contains an additional statement taken from information supplied by Esther Antonio that the person responsible for the payment of the pediatric services of her child, Rachal, was the same Elmer Fike. This document is dated 9/29/75 and opposite the name Elmer Fike, described as the person responsible for the payment of the charges, appears the name "Mo. Esther B. Antonio". This was information furnished by the Plaintiff herein, Esther Antonio, to the Lovelace Clinic and constitutes her own declaration about Elmer Fike. This document is attached hereto as Exhibit C and is part of the deposition of Lovelace Clinic which deposition will be filed herein.

5. That the pediatric services for the child, Rachal, were services performed at the time of delivery and follow-up pediatric care at the Clinic. That the information furnished by Esther Antonio wherein she identifies Elmer Fike as the person responsible was given shortly after the birth of Rachal Antonio, or possibly before delivery especially as to that document dated May 11, 1975 and marked as Exhibit A to this Motion.

6. That Exhibit A, which is the first in time of three documents in the Lovelace Clinic file, was prepared by

Dr. Pinkerton on May 11, 1975, the date of birth of the child, Rachal. This document, Exhibit A, states that Elmer C. Fike is the "Responsible Party". This document states that Elmer C. Fike is the "Responsible Party" for "Lovelace Clinic Medical Services" furnished to Rachal D. Antonio. The services for which Elmer C. Fike was the "Party Responsible" was for "attending" the birth and routine newborn care.

7. That the three Lovelace documents, Exhibits A, B, and C, are part of the deposition of Dr. Pinkerton, the Lovelace pediatrician, which desposition will be filed herein. All three documents are attached in support of this Motion.

8. That Exhibit B, dated May 27, 1972, which was sixteen days after Rachal's birth, "Elmer C. Fike" is not only the person identified as "Responsible Party" but is also described under "Relation to Patient" as "Step-father", underlining supplied. His "birth date" is also given as "10-4-30" and is described as "self-employed" as a "farmer". See Exhibit B. The patient is "Antonio", first name "Rachal", initial "D" with birth date of "5-11-75".

9. That said Exhibits are a repetitious assertion that "support" for the child was asserted to be the responsibility of Elmer C. Fike.

10. That the Plaintiff is barred from her attempt to avoid the Statute of Limitations because she claimed repeatedly that Elmer C. Fike was "Responsible" for the support of the child.

11. That support is the sole basis for her attempt to bring a lawsuit two years after the Statute established a limitation.

12. That Plaintiff cannot claim the child as being legally the support obligation of Elmer C. Fike and make that assertion near the birth of the child and then four years later seek to avoid her delay in bringing the suit on the grounds that someone else supported the child.

13. She is estopped to select an alleged father from a group as the object of her paternity suit after the Statute has expired when she claims in legal documents that another man was responsible for the payment of necessary medical (p. 3) and periatric services.

14. That her assertion that Elmer C. Fike was the step-father is also a declaration barring her from waiting for two years after the Statute has run, that someone else is responsible for the "support".

15. That New Mexico law does not permit the Statute of Limitations to be avoided by claiming that two persons supported her child and then select one as the defendant after the Statute has run.

16. That under her attempt to avoid the Statute of Limitations by claiming support from the defendant she could, if this case would go against her, initiate a second suit against Elmer C. Fike.

17. That a Statute of Limitations exists because difficulties of proof are not only more difficult but also more uncertain with the passage of time.

18. That it is inequitable to allow the Plaintiff to try to explain away documentary and signed and written

evidence by parol testimony as a means of avoiding a Statute which says her suit must be brought in two years.

19. That the doctrine of laches in addition to, or as an alternative, to, the Statute of Limitations also bars this action.

20. That attached hereto as Exhibit D is the birth certificate of Rachal D. Antonio which is a public record wherein she did not identify the father. She intentionally declined to state who it was. This failure together with Exhibits A, B and C wherein the "Party Responsible" and the "step-father" are written documents which bar her trying to fill in the blank in the Birth Certificate some seven years after the birth.

21. That the principles of laches apply. The matters raised by her attempt to avoid the Statute could all have been more readily investigated at the time and not seven years later.

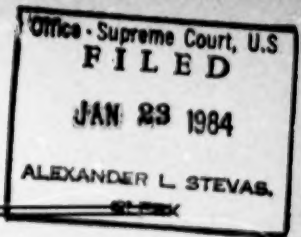
We request that the Claim be dismissed or barred by the two year Statute of Limitation or on the principles of "laches".

KLECAN & SANTILLANES, P. A.

By: /s/ Eugene E. Klecan
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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to opposing counsel of record this 9th day of June, 1982.
/s/ E. E. Klecan

No. 83-953



In The
Supreme Court of the United States
October Term, 1983

RICHARD ROCK,

Petitioner,

vs.

ESTHER ANTONIO,

Respondent.

**RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO**

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GROUND'S OF COURT'S JURISDICTION

This Court has no jurisdiction. The Petitioner alleges jurisdiction under 28 U.S.C. § 1257, but Respondent disagrees and will direct her argument to that dispositive issue.

STATEMENT OF THE CASE

Respondent adopts by reference the Petitioner's Statement of the Case and offers the following additional matter which she deems necessary for clarification of the issues. All appendix references are to Petitioner's appendix to Petition for Writ of Certiorari.

In a discovery proceeding heard before the District Court for the Second Judicial District for the State of New Mexico (hereinafter the District Court), the Plaintiff sought and obtained several orders directing the Defendant to appear for the taking of blood for use in HLA and red blood cell typing. The Defendant failed to appear on several occasions and the Plaintiff sought sanctions and default pursuant to New Mexico Rule of Civil Procedure Number 37. As a result of a hearing on that motion, the District Court entered an order directing the Defendant to either appear or suffer the extreme sanctions set forth in detail in the order appearing at App. 2. The Defendant did appear, but appealed the Court's order to the Supreme Court of the State of New Mexico.

It should be emphasized that the judgment awarded was a judgment for partial attorney's for the bringing of a discovery motion pursuant to Rule 37, New Mexico Rules of Civil Procedure to enforce a discovery order previously entered by the District Court pursuant to Rule 35, New Mexico Rules of Civil Procedure.

The Plaintiff filed a Motion to Dismiss Defendant's appeal (App. 28) asserting that she confessed error on one point and alleging that the matters sought to be reviewed were not ripe for appeal. Plaintiff's contentions

therein are all contained in her Brief in Support beginning at App. 29.

The New Mexico Supreme Court dismissed the appeal and ordered the judgment entered to be amended (App. 36).

Defendant seeks a Writ of Certiorari based on the order of the New Mexico Supreme Court dismissing his appeal.



SUMMARY OF ARGUMENT

This case is not ripe for Petition for Writ of Certiorari pursuant to 28 U. S. C. § 1257 because it is not a final judgment or decree rendered by the highest Court of the State of New Mexico where a federal matter was dispositive.



ARGUMENT AND AUTHORITIES

Petitioner seeks to review a decision of the New Mexico Supreme Court in which all the New Mexico Supreme Court did was correct a defect in an otherwise non-appealable order and dismiss the remainder of the appeal because it was not ripe for appeal. The Supreme Court did *not* make any decision on the merits of the matters which Petitioner attempted to raise in that appeal. See App. 36. The only ground on which Respondent moved the New Mexico Supreme Court to dismiss Petitioner's appeal was

ripeness. Apparently the Court agreed in dismissing the appeal.

28 U. S. C. § 1257 provides a jurisdictional basis upon which this Court can hear matters coming from state courts on Writ of Certiorari. In relevant part § 1257 provides that:

“Final judgments or decrees rendered by the highest Court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:
. . .

(3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. . . .”

One need read no further into § 1257 than “Final judgments” to see that this Court has no jurisdiction over this case at this time. All of Respondent’s arguments regarding finality made in her Brief in Support of her Motion to Dismiss found at App. 29 are hereby incorporated for sake of brevity. The New Mexico Supreme Court dismissed Petitioner’s appeal, not on the merits, but because it was not ripe for appeal. When this matter has been heard at trial, a judgment rendered and an appeal decided on the merits by the New Mexico Supreme Court, the Petitioner may, depending upon the outcome, seek relief in this Court. He is not properly here now.

The Petitioner previously raised the same jurisdictional arguments he now makes before this Court in Appeal

from the Supreme Court of New Mexico, No. 81-1034, in the Supreme Court of the United States. That case was dismissed on Motion of Respondent.

CONCLUSION

Petitioner does not properly seek a review of a final judgment or decree rendered by the highest Court of the State of New Mexico, the Supreme Court of the State of New Mexico. The Petition for Writ of Certiorari should be denied, and the Respondent should be awarded attorney's fees and her costs incurred herein.

Respectfully submitted,

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